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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1969

ASHTON J. MOUTON, COLLECTOR OF REVENUE, STATE OF LOUISIANA,
Petitioner,

v.

SINCLAIR OIL AND GAS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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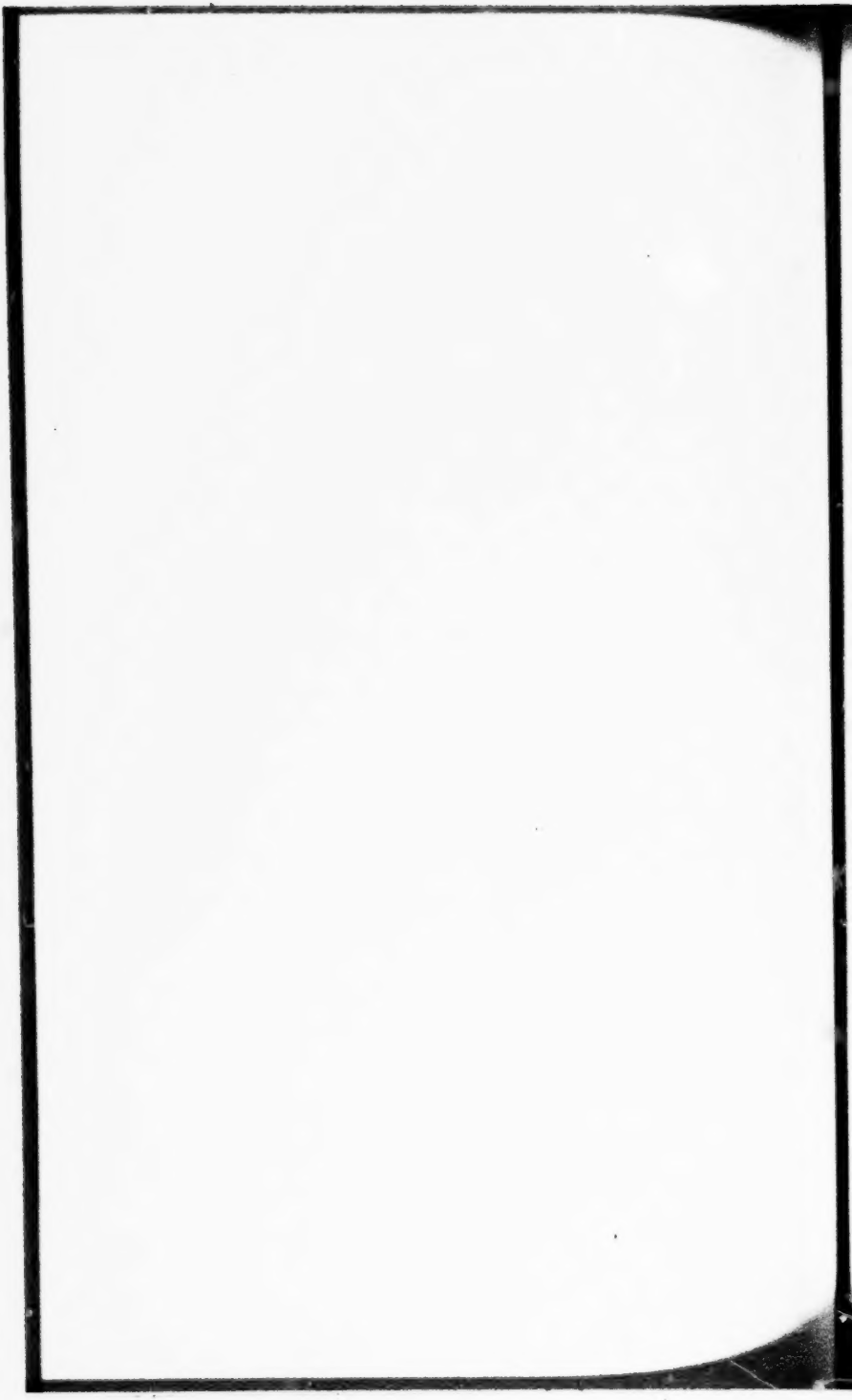

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INDEX

Page

Table of Authorities ii

Petition

Opinion 1

Jurisdiction 2

Questions Presented for Review 2

Statutes Involved 3

Statement of Facts 3

Argument on Questions Presented

Argument on Question on Number One.... 6

Argument on Question on Number Two.... 20

Conclusion and Prayer 29

Certificate of Service 30

Appendix

Judgment of United States Court of Appeals for the Fifth Circuit 31

Opinion of United States Court of Appeals for the Fifth Circuit 32

United States Statutes prior to codification 35

Codification and House Comments thereon 37

Louisiana Statutes providing a Plain, Speedy and Efficient remedy for the collection of taxes paid under protest 44

TABLE OF AUTHORITIES

CASES

Page

City of Houston v. Standard Triumph Motor Company, 5th C.A., 1965, 347 F. 2d 194, Cert. den. 382 U.S. 974, 15 L.Ed. 2d 466, 86 S.Ct. 539. 24

George F. Alger and Company v. Peck, Ohio, S. Dakota, 1954 119 F. Supp. 812. 25

Georgia Railroad and Banking Company v. Redwine, 342 U.S. 299, 96 L.Ed. 335, 72 S.Ct. 321 (1952). 25

Great Lakes Dredge and Dock Company v. Huffman, 319 U.S. 293, 297, 87 L.Ed. 1407, 63 S.Ct. 1070, (1943). 20

Harrison v. N.A.A.C.P., 360 U.S. 167, 3 L.Ed. 2d 1152, 79 S.Ct. 1025 (1959). 26

Helmsley v. City of Detroit, 6 C.A., 1963, 320 F. 2d 476. 25

Kaiser Steel Corporation v. Ranch Company, 391 U.S. 593, 20 L. Ed. 2d 835, 88 S.Ct. 1753 (1968). 25

Leiter Minerals v. United States, 352 U.S. 220, 1 L.Ed. 2d 267, 77 S.Ct. 287 (1956). 21

Leiter Minerals v. California Company, 241 La. 915, 132 So. 2d 845 (1961). 23

Leiter Minerals v. United States, 5th C.A., 1964, 329 F. 2d 85. 23

Louisiana Power and Light Company v. City of Thibodeaux, 360 U.S. 25, 3 L.Ed. 2d 1058 79 S.Ct. 1070 (1959). 23

BLEED THROUGH POOR COPY

Page

Matthews v. Rodgers, 284 U.S. 521, 76 L.Ed. 447, 52 S.Ct. 217 (1931). 21

Mississippi River Fuel Corporation v. Cocreham, La. E.D., 1965, 247 F. Supp. 819, reversed 5 C.A. 1967, 382 F. 2d 929. 18

Mississippi River Fuel Corporation v. Fontenot, 5th C.A., 1956, 234 F. 2d 898, Cert. denied 352 U.S. 916, 1 L.Ed. 2d 122, 77 S.Ct. 213. 17

Murphy Corporation, et al v. Fontenot, 255 La. 379, 73 So. 2d 180 (1954), Cert. denied, 348 U.S. 831, 99 L.Ed. 655, 75 S.Ct. 54. 17

Natural Oil and Gas Corporation v. Waggonner, 151 So. 2d 575 (1963), reversed by 376 U.S. 369, 11 L.Ed. 2d 782, 84 S.Ct. 857 (1964). 18

Township of Somerset County, New Jersey v. Cromwell, 326 U.S. 620, 90 L.Ed. 358, 66 S.Ct. 445 (1946). 25

Wyandotte Chemicals Corporation v. City of Wyandotte, 6 C.A., 1963, 321 F. 2d 927. 25

UNITED STATES STATUTES

Title 28, United States Code, Section 1254(1) 2

Title 28, United States Code, Section 1331 3

Title 28, United States Code, Section 1332 3

Title 28, United States Code, Section 1341 3

Title 28, United State Code, Section 1651(a) 2

Section 24 of the Judiciary Code of 1911, Paragraph 1, March 3, 1911, c. 231, 36 Stat. 1091, as amended by May 14, 1934, c. 283, 48 Stat. 775, August 2, 1937, c. 726, 50 Stat. 143. 7

LOUISIANA STATUTES

Page

Title 47, Louisiana Revised Statutes of 1950 Section 631 4

Title 47, Louisiana Revised Statutes of 1950, Section 1576 44

OTHER AUTHORITIES

Congressional Record, Volume 78, Part 2, 73rd Congress, 2nd Session, pages beginning at 1915, 2014 and 2238. ..... 11, 35

Committee on the Judiciary, Report No. 1035, 75th Congress, 1st Session. 16

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1969

ASHTON J. MOUTON, COLLECTOR OF REVENUE, STATE OF LOUISIANA,

Petitioner,

v.

SINCLAIR OIL AND GAS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ASHTON J. MOUTON, Collector of Revenue for the State of Louisiana does hereby petition this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, in Number 25,751 of that Court, Ashton J. Mouton, Collector of Revenue, State of Louisiana versus Sinclair Oil and Gas Company.

OPINIONS BELOW

The petition for a rehearing was denied without written opinion by the United States Court of Appeals for the Fifth Circuit. The written opinion on the case by the Court of Appeals for the Fifth Circuit has not yet been reported. Both the written opinion and the

application for rehearing are attached hereto as Appendix A.

The United States District Court for the Eastern District of Louisiana, Baton Rouge Division, refused to remand this case to the Louisiana District Court from whence it had been removed. It then granted summary judgment to Sinclair Oil and Gas Company simply by an order to that effect entered in the record.

JURISDICTION

The decree of the United States Court of Appeals for the Fifth Circuit was entered and signed on April 22, 1969. A petition for a rehearing was denied on May 19, 1969. An order staying the mandate of the court to and including July 25, 1969, was signed by the Deputy Clerk on May 23, 1969.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1) and Title 28 U.S.C., Sec. 1651(a).

A writ of certiorari is applied for on the ground that the courts below lacked jurisdiction as a matter of federal law and that a suit filed in a state court cannot be removed to a federal court when the federal court would have no jurisdiction if filed in that court.

QUESTIONS PRESENTED FOR REVIEW

1.

Under federal law does a federal district court have jurisdiction of a suit to determine the legality of state taxes when the State involved provides the tax-

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payer a plain, speedy and efficient remedy in its own courts for the contest of the taxes asserted by the State?

2.

In the alternative, only in the event this Court determines question number one adverse to the Collector, is the federal district court required to stay its hand until the question of the legality of a State tax is determined in the state court when the question is there pending?

STATUTES INVOLVED

Title 28, United States Code, Section 1331, relative to a federal question.

Title 28, United States Code, Section 1332, relative to diversity of citizenship.

Title 28, United States Code, Section 1341, relative to taxes by states.

Title 47, Louisiana Revised Statutes of 1950, Section 1576, relative to the remedy provided by Louisiana law for the recovery of taxes paid under protest.

The full text of the above sections are set out in Appendix A.

STATEMENT OF THE CASE

This case was originally filed in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana. The object of the suit was to collect certain state severance taxes which the Collector of Revenue, State of Louisiana, hereinafter referred to as "Collector", claimed were due by the defendant,

Sinclair Oil and Gas Company, hereinafter referred to as, "Sinclair".

The taxes which the Collector claimed as due are imposed by state law. LSA—R.S. 47:631:

> §631 Imposition of tax
>
> Taxes as authorized by Section 21 of Article X of the Constitution of Louisiana, are hereby levied upon all natural resources severed from the soil or water, including all forms of timber, including pulp woods, and turpentine and other forest products; minerals such as oil, gas, natural gasoline, distillate, condensate, casinghead gasoline, sulphur, salt, coal, lignite and ores; also marble, stone, gravel, sand, shells and other natural deposits; and the salt content in brine.

At no time did the Collector assert the taxes claimed were due under any federal law and at no time did the Collector assert any federal law as a basis of his claim. Sinclair was not threatened by any irreparable injury nor has it ever claimed that it would be. Sinclair was not required to pay any of the taxes asserted until it had had its day in the Louisiana Courts and in the United States Supreme Court if it chose to apply for a writ of certiorari and that writ had been granted. That is because Louisiana provided a plain, speedy and efficient remedy in its own courts for the contest of taxes.

Sinclair answered the suit and asserted as a defense allegations to the effect that the oil and gas against which the Collector was asserting his claims for severance taxes were produced in Barksdale Air

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Force Base. Sinclair further answered to the effect that the Collector could not apply the tax to oil and gas produced in Barksdale because the base was an area of exclusive federal jurisdiction.

After the filing of the answer and the exceptions the Collector agreed to a stipulation proposed by Sinclair which showed that the oil and gas against which the tax was asserted by the Collector were produced within the confines of Barksdale Air Force Base.

Sinclair later removed this case to this Court on the grounds:

1. That the Collector was acting unconstitutionally and therefore individually, not in his official capacity as the Tax Collector of the State.
2. That the Collector's petition when considered with the stipulation agreed to by him raised a federal question that should be ruled on by the federal court.

The Collector moved to remand the case to the State Court on the grounds that:

1. The Collector was acting in his official capacity for the State and the taxes he was asserting against Sinclair do not inure to his benefit but to the exclusive benefit of the state. Therefore, since one of the parties was the State and since a State of the United States is not a citizen there was no diversity jurisdiction.
2. That the Collector presented no federal question to the State Court; that the federal question, if any, was presented by Sinclair as a defense and this did not make the state suit removable.

The lower court refused to remand this case; instead, it held that it had jurisdiction and then rendered summary judgment for Sinclair.

ARGUMENT ON QUESTIONS PRESENTED

1.

Argument on Question No. One.

It is respectfully submitted that a suit in a State Court cannot be removed to a federal district court in which jurisdiction does not exist under federal law. In the instant case jurisdiction in the federal district court to which the case was removed from State Court did not exist not only because of the two reasons stated by the Collector as grounds for a remand but also because the State of Louisiana provides a plain, speedy and efficient remedy in its own courts for the contest of taxes and when such a remedy is provided by a state court *Congress* has limited the jurisdiction of the federal district courts. This additional reason was also argued in the Court below. That Louisiana does provide a plain, speedy and efficient remedy in its own courts for the contest of taxes has been noted *with approval* by no less an authority than the United States Supreme Court. *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 296, 87 L.Ed. 1407, 1410, 63 S.Ct. at page 1072 (1943).

Both the District Court and the Circuit Court found that:

1. The suit in federal court was a suit against the Louisiana Collector of Revenue acting illegally in his individual capacity, and,

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2. The suit presented a federal question.

Based on the above two findings both lower courts concluded that they had jurisdiction. However, it is submitted that these two findings were not correct and neither were they sufficient to confer jurisdiction on the two lower courts because of the express statutory law limiting such jurisdiction in questions involving state taxes even when there is both diversity and a federal question where a state provides a plain, efficient and adequate remedy in the state court for the contest of such taxes from whence the cases can be taken to the United States Supreme Court.

Congress first expressed its will concerning this limitation by an act passed August 2, 1937, c. 726, Sec. 1, 50 Stat. 143, wherein it added the last sentence to the first paragraph of Section 24 of the Judicial Code as it then read. March 3, 1911, c. 231, Sec. 24, Par. 1, 36 Stat. 1091. Sec. 24 of the Judiciary Code had been previously amended on May 14, 1934, c. 283, Sec. 1, 48 Stat. 775, so that with the 1934 amendment and the 1937 amendment Sec. 24 of the Judiciary Code read as follows:

> The district courts shall have original jurisdiction as follows:
>
> Of all suits of a civil nature, *at common law or in equity*, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; *or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand*

dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. (italics supplied)

(The following was added by the 1934 amendment). Notwithstanding the foregoing provisions of this paragraph no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing,

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and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.

(The following was added by the 1937 amendment). *Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.*" (italics supplied)

The Judiciary Act of 1911 was codified in 1948. In that codification what was formerly the first paragraph of Section 24 became Title 28, United States Code, Sections 1331, 1332, 1341, 1342, 1345, 1354 and 1359. The House Committee report on the codification and any revisions made relative to the former first paragraph of Section 24 of the 1911 Judiciary Act are contained in "Revision of Title 28, United States Code, House Report 308, 80th Congress, 1st Session." Pertinent parts of the report as well as the Section 24 of the Judiciary Act of 1911 together with the 1934 and 1937 amendments are reproduced in the Appendix for the convenience of the court. The House Report clearly shows that no significant changes were made in the law as it was prior to codification with reference to the limitation of jurisdiction of federal district courts relative to the collection of state taxes except that in view of the then new Rules of Civil Procedure, the words, "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity."

(See House Report on Sections 1331, 1332, 1341 of Title 28 of United States Code, which are reproduced in the Appendix)

If we now rewrite the first paragraph of Sec. 24 of the Judiciary Act of 1911 as it appeared in 1937 when Congress first limited the district courts' jurisdiction in state tax matters, leaving out all portions thereof which do not pertain to the case at bar, it would read as follows:

> "The district courts shall have original jurisdiction as follows:
>
> Of all suits of a civil nature, *at common law or in equity* brought by the United States, . . . or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) *arises under the Constitution or laws of the United States . . . or* (b) *is between citizens of different states . . . Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state.*" (Italics supplied)"

When read as above the Collector submits that Congress in its first legislation limiting the jurisdiction of the district courts to entertain suit relating to the collection of state taxes clearly and unequivocally stated that the restraint was applicable to *all* such

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suits whether they were designated as suits at common law or in equity, provided, of course, a plain, speedy and efficient remedy existed in the courts of the state. Since the 1948 codification did not change that limitation in any way it follows that statutory federal law as it now stands does not give the district courts the authority to entertain and pass upon civil actions to recover state taxes where the state provides a plain, speedy and adequate procedure for such recovery in its own courts

The intention of Congress to limit the lower federal courts jurisdiction in all tax cases is made doubly clear when one considers the great debate which took place in the Senate when the 1934 amendment to the Judiciary Code was adopted. *Congressional Record, Volume 78, Part 2, 73rd Congress, 2nd Session, pages beginning at 1915, 2014 and 2238. On Senate Bill No. 752.* The 1934 amendment did not concern taxes but as it clearly appears from the debate on that amendment, it concerned the restriction of the federal courts' power relative to suits by public utilities. The case for the limitation of the lower federal courts' jurisdiction was clearly stated by Senator Johnson as reported in the Congressional Record above referred to, beginning at page 1915, second column.

> "The design of the measure is to correct what has become an intolerable evil. Those who are familiar at all with the various commissions which the States have set up for the regulation of public utilities and the determination of their rates will realize from their experience that the process is

interminable where not only the State courts may be resorted to by the public utility which questions the decision of the State regulatory commission, but the United States courts may be resorted to as well.

The bill takes no substantive right away from the public utility corporations. It enables, of course, the public utility corporation to pursue its remedy through all the courts of the States and ultimately through the United States Supreme Court itself, but it seeks to put the public utility as a litigant in the same category that citizens of the States would be put under like circumstances.

It would seem, from looking at the record of the various cases that have gone to the court of last resort, as if our public utility corporations maintain a circumlocution office the design of which is to rival, in the matter of finality of fixing of rates by the various States, the celebrated case of Jarndyce against Jarndyce.

The bill comes here not from one State, but it comes from many States of the Union. It has the approval practically of every public utility commission of every State that possesses such a commission. It has the approval, too, of those who have had great trouble and great labor and great expense in endeavoring justly to fix the rates of public utility corporations in the different States of the Union.

I have with me letters from different States, all approving the measure, all begging for the relief. I have one from California from its railroad commission and from the California Farm Bu-

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reau Federation, one from the Public Utilities Commission of the State of Colorado, from the Public Service Commission of Indiana at Indianapolis, from the Board of Railroad Commissioners of the State of Montana, from the National Association of Railroad and Utility Commissioners, which maintains an office in this city, from the Public Service Commission of the State of Nevada at Carson, from the Department of Public Service of the State of New York, from the Public Commission of Oregon, from the Public Service Commission of Wisconsin, and various others, all uniting in the plea for the passage of this bill and praying that regulation, which has been attempted by the States, may if just and fair, be ultimately put in force without the intolerable and interminable delays which have existed in the past.

Not only this, but the President himself dealt with the subject when he was Governor of New York, and he dealt with it in no uncertain tones.

In January 1930 President Roosevelt, then Governor of the State of New York, sent a special message to the New York Legislature, then in session, from which I quote:

The recent decision of the Federal court in the southern district of New York permitting the New York Telephone Co. drastically to raise its telephone rates brings to the fore in a striking way the whole question of interference by the United States courts with the regulatory powers of our public-service commission. * * *

It means that hearings and trials which rightfully should be held before our public-service commission or before State courts are, by a

scratch of the pen, transferred to a special master appointed by the Federal court. The State regulatory body * * * is laughed at by the utility seeking refuge with a special master, who is unequipped by experience and training, as well as by staff and assistants, to pursue that searching inquiry into the claims of the company which the consuming public is entitled to demand. The special master becomes the rate maker; the public-service commission becomes a mere legal fantasy.

This power of the Federal court must be abrogated.

This is the language of the President:

'Only the Congress can give the remedy. Legislation has been introduced in the Congress to carry out this purpose. * * * I recommend to your honorable bodies that you memorialize the Congress to pass this legislation.'

There have been classic examples during the last few years of the methods that public utilities pursue in order to delay and to hamper just regulation and to prevent the putting into effect of rates which are fixed by the public-utility commissions of the various States. I cannot better show the wrongs that have been permitted by the existing law, and the necessity for the measure which is today presented, than by reading to you from the Public Service Commission of the State of Montana its peculiar experience in relation to its endeavor to control and regulate Montana's public utilities. It is high time that the public utility was taught by the Congress of the United States that its rights are exactly the same as those of any citizen of any State, but that it has no greater

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rights and no higher privileges than any citizen of the State; and it is endeavored by this measure to put in the same category, so far as litigation is concerned, the public utility with the citizen of the State.

There is no reason in law, in equity, in justice, in governmental policy, indeed, in saying that two bites at the cherry, as it were—two sources of litigation—shall be open at the sweet will of the public utility, where but one is given to the ordinary citizen, and that a public utility may go on with its litigation in a State court until it thinks it may be defeated, and then go into a United States court, obtain its injunction there, refer the case to a master of its selection, who will go over the same ground that the public-utility commission has gone over and upon that evidence, that has once been taken, again take as it sees fit, through those who have little knowledge of the subject, the same evidence, and then substitute its will in the Federal court for the will of the State court and the will of the people, who are represented by their public-utility commission.

It is that we seek to prevent here. The Judiciary Committee, by a very large majority, reported the bill favorably. My two distinguished brethren—one from Vermont, the other from Rhode Island—are in opposition, and have presented a minority report; but I challenge them to present the view of a single State in opposition to the legislation that is proposed, or in opposition to curtailing the extraordinary and outrageous privilege, from the standpoint of litigation, that heretofore has been accorded to these public-utility corporations."

Opponents of the bill raised the question of constitutionality and also whether it was wise to so limit the jurisdiction of the federal courts in any event. The proponents won since that great debate there has been no question that it is the will of Congress that where a plain, speedy and efficient remedy for the contest of the public utility rates may be had in the state courts the use of the federal courts are denied to public utilities.

In 1937 Senator Johnson directed his attention to a similar situation which then existed relative to the federal courts' interference with the collection of state taxes. Senate Bill 1551 was introduced to limit the lower courts' jurisdiction and it was adopted in the form shown on page 9 of this brief. In the 1948 revision of the Judiciary Code the amendment was written as it appears in Title 48, U.S.C., Sec. 1341.

No great debate took place with reference to the 1937 amendment. In the report of the Committee on the Judiciary, Report No. 1035, 75th Congress, 1st Session, the Committee simply stated:

> "It should be emphasized that the bill does not take away any equitable right of the taxpayer or deprive him of his day in court. Specific provision is made that the suit will not be withdrawn from the jurisdiction of the Federal district court except where there is a plain, speedy, and efficient remedy at law or in equity in the courts of the State. A full hearing and judicial determination of the controversy is assured. An appeal to the Supreme Court of the United States is available as in other cases.

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The propriety of this kind of legislation was fully discussed by the Senate Judiciary Committee when the so-called Johnson Act of May 14, 1934, S. 752, Public, No. 222, was favorably reported and subsequently passed by the Congress.

The report on the Johnson bill pointed out that the continuance of the unjust discrimination between citizens of the State and foreign corporations doing business in such State has been the cause of much controversy. The controversies arising out of the use of the injunctive process in State tax cases would be eliminated by the passage of this bill."

Let us now look at the history of this litigation involving the same area, the same tax and, in most cases, the same parties. The legality of the Louisiana severance tax imposed on oil and gas produced from Barksdale Air Force Base was first litigated by the oil companies in the Louisiana Courts in 1955 in the case of *Murphy Corporation, et al v. Fontenot*, 255 La. 379, 73 So. 2d 180 (1954). The legality of the tax was upheld by the Louisiana Supreme Court and the United States Supreme Court denied certiorari. 348 U.S. 831, 99 L.Ed. 655, 75 S.Ct. 54. The oil companies then went into federal court to test the question. In the case of *Mississippi River Fuel Corporation v. Fontenot* the United States Court of Appeals for the Fifth Circuit upheld the legality of the tax. *Mississippi River Fuel Corporation v. Fontenot*, 5th C.A., 1956, 234 F. 2d 898. The United States Supreme Court denied writs. Cert. den. 352 U.S. 916, 1 L.Ed. 2d 122, 77 S.Ct. 213. After the loss in the Louisiana Supreme Court and

the loss in the federal Fifth Circuit the oil companies had no choice except to wait for an excuse to present the question to the courts again. This excuse arose in the case of *National Gas and Oil Corporation v. Waggonner*, 151 So. 2d 575 (1963), Cert. den. by the Louisiana Supreme Court, 244 La. 463, 152 So. 2d 561. This later case involved the imposition of an *ad valorem* tax on certain equipment the oil companies possessed in the area in question. This time the United States Supreme Court granted writs and held that the ad valorem tax could not be imposed because the equipment was located in an area of exclusive federal jurisdiction. *Humble Pipeline Company v. Waggonner*, 376 U.S. 369, 11 L.Ed. 2d 782, 84 S.Ct. 857 (1964). Using the Waggonner case as a spring board the oil companies then again tested the legality of the severance tax in the federal court. The federal court ruled against the oil companies. *Mississippi River Fuel Corporation v. Cocreham*, La. E.D., 1965, 247 F. Supp. 819, but on appeal the Fifth Circuit over the strenuous objection of the Collector as to its jurisdiction, declared the severance tax illegal on the basis of the Waggonner case although the Waggonner case was an ad valorem tax case. *Mississippi River Fuel Corporation v. Cocreham*, 5th C.A. 1967, 382 F. 2d 929. On application for a rehearing the Fifth Circuit, sitting as a three judge panel, refused to grant a rehearing by a two to one decision. So, in 1968 the question of the legality of the severance tax as applied to the oil companies operating in the area in question stood as follows:

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1. The legality of the tax upheld by the Louisiana Supreme Court in 1954. Certiorari denied by the United States Supreme Court.

2. The legality of the tax upheld by the United States Court of Appeals for the Fifth Circuit in 1956. Certiorari denied by the United States Supreme Court.

3. The legality of the tax overturned by the United States Court of Appeals for the Fifth Circuit in 1968. Rehearing denied by a two to one decision. Certiorari denied by the United States Supreme Court.

With the above history in mind the Collector filed this suit in the Louisiana courts with the idea that the Louisiana courts should have the opportunity to interpret the state laws which had been interpreted by the Fifth Circuit in the 1968 Mississippi River Fuel case. But the Collector has been hamstrung in this effort by the removal of this case to the federal courts. In so hamstringing the Collector it is respectfully submitted that the lower district court as well as the United States Court of Appeals for the Fifth Circuit has not only clearly disregarded the will of Congress in limiting the lower federal courts' jurisdiction as shown by the great debate which took place when the 1934 amendment to the Judiciary Code was considered but the Fifth Circuit has also placed the litigation of state taxes back in the jungle of state and federal concurrent jurisdiction and endless litigation as the history of the litigation of this particular state tax for the past 15 years so clearly shows.

PART II.

In the alternative, it is respectfully submitted that when the question of the legality of a state tax is pending in a state court and the state provides a plain, speedy and efficient remedy for the contest of the tax in the state court that even though a federal court may have jurisdiction still the federal court has no discretion but to stay its hand until the question is resolved in the state court.

The Collector will now show this court that even where there is *unquestioned federal jurisdiction* to hear a case, as in a suit between citizens of different states or the determination of a federal question if the taxpayer has a plain, adequate and efficient remedy at law in the state courts, the federal courts must not exercise that jurisdiction until the highest courts of the state whose statute is alleged to be unconstitutional or otherwise illegal has had an opportunity to pass on the illegality or unconstitutionality of the statute. This is the doctrine of abstention.

In *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 87 L.Ed. 1407, 63 St. Ct., 1070 (1943), the taxpayer brought suit in the District Court for the Eastern District of Louisiana against a Louisiana state officer charged with the administration of the Louisiana Unemployment Compensation Law. The prayer was for a judgment declaring the State law unconstitutional as applied to the plaintiff and their employees. The statute in question exacts of employers payment into the state unemployment insurance fund, in the nature of an excise tax upon the exercise of the

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right or privilege of employing individuals and measured by a percentage of the wages paid. The District Court held the law constitutional and so did the Fifth Circuit. The Supreme Court granted certiorari and specifically asked counsel:

> "to discuss in their briefs and on oral argument the question whether the declaratory judgment procedure can be appropriately used in this case where the complaint seeks a judgment against a state officer to prevent enforcement of a state statute."

In its opinion the court considered Act No. 330 of the 1938 Louisiana Legislature and held that the act, now LSA-R.S. 47:1576, provides an adequate remedy in the Louisiana state courts for the recovery of taxes paid under protest. Then the Supreme Court, quoting liberally from *Matthews v. Rodgers*, 284 U.S. 521, 76 L.Ed. 447, 52 S.Ct. 217 (1931), affirmed:

> ". . . but solely on the ground that, in the appropriate exercise of the Court's discretion, relief by way of declaratory judgment should have been denied." (319 U.S. 299, 301; 87 L.Ed. 1407, 1413)

Leiter Minerals v. United States, 352 U.S. 220, 1 L.Ed. 2d 267, 77 S.Ct. 287 (1956). In 1938 one Leiter conveyed certain lands to the United States with reservation of his mineral rights. Leiter subsequently transferred his mineral rights to Leiter Minerals, the claimant. No minerals were ever produced by either Leiter or his successor by virtue of the mineral reservation. In 1950 the United States granted a mineral lease to the

California Company which produced oil, gas and other minerals worth many millions of dollars. Leiter Minerals filed suit in the Louisiana State Courts to recover the value of all the minerals produced by the California Company on the ground that Leiter Minerals' mineral rights had never prescribed because of a 1940 Louisiana Act which provided that mineral rights in existence at the time Louisiana land was acquired by the United States were imprescriptible. The interpretation of the Louisiana statute was involved in the state suit. Then the United States brought suit to quiet title in its favor in the federal district court. The United States District Court held that since the United States was not a party to the state court action, title of the United States with respect to the mineral rights could be tried only in the suit in the federal court. This view was upheld by the Fifth Circuit but the United States Supreme Court modified the judgment of both the District Court and the Fifth Circuit. The Supreme Court stated at 1 L.Ed. 2d 275, 352 U.S. 228:

> "But the fact that the United States is not a party to the state court litigation does not mean that the federal court should initiate interpretation of a state statute. In fact, where questions of constitutionality are involved and the Government contends that an application of the state statute adverse to its interests would be unconstitutional our rule has been precisely the opposite: 'as questions of federal constitutional power have become more and more interwined with preliminary doubts about local law we have insisted that federal courts do not decide questions of constitution-

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ality on the basis of preliminary guesses regarding local law.' "

(Numerous citations.)

The Supreme Court then ordered the judgment of the Fifth Circuit and District Court modified so that jurisdiction was retained in the lower court but the court was to stay its hand until an authoritative opinion of the Louisiana Supreme Court as to the interpretation of the state statute was obtained.

As to the final disposition of the case the Louisiana Supreme Court did render an authoritative opinion in a suit for a declaratory judgment which was subsequently filed in the Louisiana Courts. *Leiter Minerals, Inc. v. California Co.*, (La. 1961), 241 La. 915, 132 So 2d 845. The United States Court of Appeals for the Fifth Circuit rendered judgment for Leiter Minerals in accordance with the interpretation of the Louisiana statute by the Louisiana Supreme Court. *Leiter Minerals, Inc. v. United States*, 5th Cir., 1964, 329 F. 2d 85.

In *Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25, 3 L.Ed. 2d 1058, 79 S.Ct. 1070 (1959), the City of Thibodaux, Louisiana filed a petition for expropriation in a Louisiana District Court, asserting a taking of the property of a private power company. The defendant removed the case to the United States District Court for the Eastern District of Louisiana on the basis of diversity of citizenship. After a pretrial conference the district judge, citing *Leiter Minerals*, supra, stayed the proceedings until the Supreme Court of Louisiana had been afforded

an opportunity to interpret the statute on which the city's expropriation order was based. 153 F. Supp. 515. The United States Court of Appeals for the Fifth Circuit reversed the District Court, 255 F. 2d 774, and on certiorari the United States Supreme Court reversed the Fifth Circuit and reinstated the judgment of the District Court, stating at 360 U.S. 27, 3 L.Ed. 2d 1061:

> "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law."

After the decisions of the United States Supreme Court in *Huffman*, supra, *Leiter Minerals*, supra, and *Louisiana Power and Light Co.*, supra, the Fifth Circuit had occasion to consider *City of Houston v. Standard Triumph Motor Co.*, 5th Cir., 1965, 347 F. 2d 194. Cert. denied, 382 U.S. 974, 15 L.Ed. 2d 466, 86 S.Ct. 539. The original question in that case was whether imported English automobiles were immune from Texas ad valorem taxation under the Import-Export Clause of the United States Constitution. But the original issue became secondary when the case reached this Court because the appeal turned on whether the District Court should have entertained the declaratory judgment suit at all. The United States Court of Appeals for the Fifth Circuit, after first discussing the two United States Supreme Court cases of *Matthews v. Rodgers*, supra, and *Great Lakes Dredge & Dock Co. v. Huffman*, supra, held: At 347 F. 2d 198:

> ". . . Wide as a Court's power must be in the

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exercise of its discretion whether to grant declaratory relief, the Supreme Court makes clear that 'it is the court's duty to withhold such relief' when, in the words of the Johnson Act, there is "a plain, speedy and efficient remedy . . . in the courts of the state. 319 U.S. at 300-301, 63 S.Ct. at 1074. This is the decision that the Sixth Circuit has twice reached. *Helmsley v. City of Detroit, Mich.*, 6 Cir., 1963, 320 F. 2d 476; *Wyandotte Chemicals Corp. v. City of Wyandotte*, 6 Cir., 1963, 321 F. 2d 927. The critical turning point is the adequacy of the state court remedies. See *Township of Hillsborough, Somerest County, New Jersey v. Cromwell*, 1946, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358; *Georgia Railroad & Banking Co. v. Redwine*, 1952, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335; *George F. Alger & Co. of Detroit, Michigan v. Peck*, S. D. Ohio, 1954, 119 F. Supp. 812, affirmed, 1954, 347 U.S. 984, 74 S.Ct. 853, 98 L.Ed. 1120, 1148; *Livingston v. United States*, E.D.S.C., 179 F. Supp. 9, affirmed, 1960, 364 U.S. 281 80 S.Ct. 1611, 4 L.Ed. 2d 1719. Certainly, after emphasizing the pre-Johnson Act equitable limitations congressionally approved and strengthened by the enactment, it is inconceivable that the Supreme Court intended to allow any discretion to grant declaratory relief where adequate state remedies were available."

Kaiser Steel Corporation v. Ranch Co., 391 U.S. 593, 20 L.Ed. 2d 835, 88 S.Ct. 1753 (1968), was a diversity action brought in the United States District Court for the District of New Mexico. Both the District Court and the Court of Appeals for the Tenth Circuit (388 F. 2d 257), rejected defendant's motion to stay

the federal action pending decision of the question of state law by the state court. The United States Supreme Court reversed and stated at 20 L.Ed. 2d 837:

> "The Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issues, moreover, is truly a novel one. The question will eventually have to be resolved by the New Mexico Courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource."

Harrison v. N.A.A.C.P., 360 U.S. 167, 3 L.Ed. 2d 1152, 79 S.Ct. 1025 (1959). In this case registration and barratry statutes enacted by the Virginia Legislature as part of its general plan of massive resistance to the integration of schools of the state were challenged by the National Association for the Advancement of Colored People in the United States District Court for the Eastern District of Virginia as invalid under the Fourteenth Amendment. The District Court, finding the statutes free from ambiguity, declared them unconstitutional and enjoined their enforcement. (159 F. Supp. 503). The United States Supreme Court held, at 360 U.S. 176, 3 L.Ed. 2d 1158:

> "According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court should have abstained

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from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question. In other words, we think that the District Court in dealing with Chapters 31, 32, and 35 should have followed the same course that it did with respect to Chapters 33 and 36.

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts,' *Matthews v. Rodgers*, 284 U.S. 521, 525, 76 L.Ed. 447, 452, 52 S.Ct. 217, as their 'contribution . . . in furthering the harmonious relation between state and federal authority . . .' *Railroad Company v. Pullman Company* 312 U.S. 496, 501, 85 L.Ed. 971, 61 S.Ct. 643. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."

Summarizing the above cases it can therefore be said with confidence that when the question of jurisdiction is put at issue in matters relating to state taxes, as was done in this case there must be an affirmative showing that the state has not provided a plain, speedy

and efficient remedy for the contest of the tax statute in the State Courts. *Matthew v. Rodgers*, supra and *Hillsborough Township v. Cromwell*, supra. In the instant case the United States Supreme Court has already held that Louisiana's present statute does provide a plain, speedy and efficient remedy in the State's Courts for the recovery of taxes paid under protest. *Great Lakes Dredge and Dock Co. v. Huffman*, supra. Therefore this suit should have been remanded by the District Court.

As to the *Great Lakes* case, supra, the United States Supreme Court has ruled that even in cases where there is jurisdiction in the federal courts the federal court must stay its hand in ruling on a defense based on the unconstitutionality of the state tax statute until the State Courts have had an opportunity to rule thereon, provided, of course, that the State provides a plain, speedy and efficient remedy in the State Courts. This court in *City of Houston*, supra, held that in such cases it is mandatory on the District Courts to stay their hand.

As to the cases of *Leiter Minerals*, supra, *Louisiana Power and Light Company*, supra, *Kaiser Steel Corporation*, supra, and *Harrison v. N.A.A.C.P.*, supra, the thrust of those United States Supreme Court opinions is that even in cases where there is unquestioned federal jurisdiction, the District Courts must stay their hands in any case where the unconstitutionality of any state law is contested if the state courts provide a plain, adequate and efficient remedy for the contest of the statute.

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In view of the above it is submitted that the District Court should have remanded this case to the Louisiana District Court, or at least stayed its hand until the Louisiana Court had ruled thereon.

PRAYER

In view of the foregoing the Petitioner, Ashton J. Mouton, Collector of Revenue, State of Louisiana, asks this Court:

1. To declare that the United States District Court below did not have jurisdiction of this case as a matter of federal law and to remand this case with orders that it be remanded to the Louisiana District Court.

2. In the alternative, and only in the event this Court should decide that the United States District Court below did have jurisdiction, that this case be remanded with orders that the lower court is to refrain from exercising its jurisdiction until an authoritative interpretation of the Louisiana constitutional provision and statutes involved in this case is made by the Louisiana Supreme Court.

Respectfully submitted,

Emmett E. Batson

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CERTIFICATE OF SERVICE

I, EMMETT E. BATSON, attorney of record for petitioner, do hereby certify that I have this day served a copy of the foregoing petition with appendix on the Solicitor General of the United States and on each of the attorneys of record of the respondent as shown below by depositing same in the United States Post Office with sufficient air mail postage prepaid to those over 500 miles away and first class postage to those less than 500 miles distant.

Emmett E. Batson

EMMETT E. BATSON,
Counsel of Record.

Mr. Clyde R. Brown,
Attorney at Law,
Ouachita National Bank Building,
Monroe, Louisiana.

Solicitor General of the United States,
Department of Justice,
Washington, D. C. 20530

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 26751

D. C. Docket No. Civ. 68-105

ASHTON J. MOUTON, COLLECTOR OF REVENUE, STATE OF LOUISIANA
Plaintiff-Appellant,

VERSUS

SINCLAIR OIL AND GAS COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before AINSWORTH and SIMPSON, Circuit Judges, and MITCHELL, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: April 22, 1969

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26751

ASHTON J. MOUTON, COLLECTOR OF REVENUE, STATE OF LOUISIANA,
Plaintiff-Appellant,

VERSUS

SINCLAIR OIL AND GAS COMPANY
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(April 22, 1969)

Before AINSWORTH and SIMPSON, Circuit Judges, and MITCHELL, District Judge.

PER CURIAM: This suit was originally filed by the Louisiana Collector of Revenue in a Louisiana state court to collect certain state severance taxes claimed to be due by defendant Sinclair Oil and Gas Company. Sinclair removed the suit to the federal district court and the Collector's motion to remand for lack of jurisdiction was denied. Sinclair's motion for summary judgment based on our prior holding in *Mississippi River Fuel Corporation v. Cocreham*, 5 Cir., 1967, 382

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F. 2d 929, rehearing denied, 1968, 390 F. 2d 34, cert. denied, 390 U. S. 1015, 88 S. Ct. 1264 (1968), was granted and the Collector of Revenue has appealed.

All of the legal contentions raised by the Collector in this case have heretofore been considered and ruled on adversely to him by this Court in the *Mississippi River Fuel* case. (See our per curiam decision released this day in the companion cases of *Shell v. Mouton*, No. 26493, and *Mouton v. Shell*, No. 26730.)

Nor is there any merit in the Collector's contention that this suit was improperly removed from the Louisiana state court to the federal district court since it is apparent that the federal court has jurisdiction both under diversity of citizenship, 28 U.S.C. § 1332, in that the Collector is acting unconstitutionally and therefore in an individual capacity and not as the official representative of the State of Louisiana, and because a federal question is presented, 28 U.S.C. § 1331, in that the Collector is attempting to collect severance taxes on oil and gas produced from a federal military enclave, Barksdale Air Force Base, Louisiana, on which the United States has exclusive jurisdiction as provided by Article I, Section 8, Clause 17, of the United States Constitution. See *Mississippi River Fuel Corporation*, supra at 934, citing *Georgia R. R. & Banking Co. v. Redwine*, 342 U. S. 299, 72 S. Ct. 321 (1952), and *Ex-parte Young*, 209 U. S. 123, 28 S. Ct. 441 (1908), in support thereof. It was proper, under 28 U.S.C. § 1446, to consider the stipulation of fact, together with the allegations of the complaint, on the petition of the Collector for removal.

Being of the opinion, therefore, that our holding in *Mississippi River Fuel*, supra, is conclusive as to all the legal issues presented in this case, the judgment appealed from is

AFFIRMED.

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March 3, 1911, c. 231, Sec. 24, Paragraph 1, 36 Stat. 1091.

SEC. 24. The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however*, That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

May 14, 1934, c. 283, Sec. 1, 48 Stat. 775.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph

of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

August 21, 1937, c. 726, Sec. 1, 50 Stat. 738.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

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28 United States Code, Sec. 1331. (1948 revision)

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

House Committee Report on the above revision. Revision of Title 28, United States Code, House Report 308, 80th Congress, 1st Session.

SECTION 1331–SECTION REVISED

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Jurisdiction of federal questions arising under other sections of this chapter is not dependent

upon the amount in controversy. (See annotations under section 41 of title 28, U. S. C. A., and 35 C. J. S., p. 833 et seq., §§ 30–43. See, also, reviser's note under section 1332 of this title.

Words "wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs," were added to conform to rulings of the Supreme Court. See construction of provision relating to jurisdictional amount requirement in cases involving a Federal question in *United States* v. *Sayward*, 16 S.Ct. 371, 160 U.S. 493, 40 L.Ed. 508; *Fishback* v. *Western Union Tel. Co.*, 16 S. Ct. 506, 161 U. S. 96, 40 L.Ed. 630; and *Halt* v. *Indiana Manufacturing Co.*, 1900, 20 S. Ct. 272, 176 U. S. 68, 44 L. Ed. 374.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" to conform with Rule 2 of the Federal Rules of Civil Procedure.

Words "or treaties" were substituted for "or treaties made, or which shall be made under their authority," for purposes of brevity.

The remaining provisions of section 41 (1) of title 28, U. S. C., 1940 ed., are incorporated in sections 1332, 1341, 1342, 1345, 1354, and 1359 of this title.

Changes were made in arrangement and phraseology.

28 United States Code, Sec. 1332, (1948 Revision)

§ 1332. Diversity of citizenship; amount in controversy; costs

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(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any

State by which the insurer has been incorporated, and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, Stat. 445.

House Committee report on above section. Revision of Title 28, United States Code, House Report 308, 80th Congress, 1st Session.

SECTION 1332-SECTION REVISED

Based on title 28, U. S. C., 1940 ed., § 41 (1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41 (1) of title 28, U. S. C., 1940 ed., are incorporated in sections 1331, 1341, 1342, 1345, 1354, and 1359 of this title. (See reviser's notes under said sections.)

Jurisdiction conferred by other sections of this chapter, except section 1335, is not dependent upon diversity of citizenship. (See annotations under section 41 of title 28, U. S. C. A., and 35 C. J. S., p. 833; et seq., §§ 30–43. See, also, reviser's note under section 1331 of this title.) As to citizenship of bank where jurisdiction depends upon diversity of citizenship, see section 1348 of this title.

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Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" in order to conform to Rule 2 of the Federal Rules of Civil Procedure.

Words "or citizens of the District of Columbia, Territory of Hawaii, or Alaska, and any State or Territory" which were inserted by the amendatory Act April 20, 1940, are omitted. The word "States" is defined in this section and enumeration of the references is unnecessary.

The revised section conforms with the views of Philip F. Herrick, United States Attorney, Puerto Rico, who observed that the Act of April 20, 1940 permitted action between a citizen of Hawaii and of Puerto Rico, but not between a citizen of New York and Puerto Rico, in the district court.

This changes the law to insure uniformity. The 1940 amendment applied only to the provision as to controversies between "citizens of different States." The new definition in subsection (b) extends the 1940 amendment to apply to controversies between citizens of the Territories or the District of Columbia, and foreign states or citizens or subjects thereof.

The diversity of citizenship language of section 41 (1) of title 28, U. S. C., 1940 ed., as amended in 1940, was described as ambiguous in *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385, 386. In that case the 1940 amendments was held unconstitutional insofar as it affected the District of Columbia. However, two other district courts upheld the amendment. *Winkler* v. *Daniels*, D. C.

Va. 1942, 43 F. Supp. 265; *Glaeser* v. *Acacia Mutual Life Assn.*, D. C. Cal. 1944, 55 F. Supp. 925.

This section is intended to cover all diversity of citizenship instances in civil actions in accordance with the judicial construction of the language in the original section 41 (1) of title 28, U. S. C., 1940 ed. Therefore, the revised language covers civil actions between—

Citizens of a State, and citizens of other States and foreign states or citizens or subjects thereof;

Citizens of a Territory or the District of Columbia, and foreign states or citizens or subjects thereof;

Citizens of different States;

Citizens of different Territories;

Citizens of a State, and citizens of Territories;

Citizens of a State or Territory, and Citizens of the District of Columbia;

Citizens of a State, and foreign states or citizens or subjects thereof.

The revised section removes an uncertainty referred to in the McGarry case, supra, as to whether Congress intended to permit citizens of the Territories or the District of Columbia to sue a State or Territory itself rather than the citizens thereof. The court observed that "Congress could hardly have had such intention."

The sentence "The foregoing provisions as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases men-

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tioned in the succeeding paragraphs of this section" was omitted as unnecessary. Those paragraphs are (2)–(28) of said section 41 of title 28, U. S. C., 1940 ed., which are revised and incorporated in this chapter and, except for those relating to actions against the United States and interpleader, contains no provision as to a sum or value necessary to confer jurisdiction. Consequently the omitted sentence is covered by excluding such requirement.

Section 41 (1) of title 28, U. S. C., 1940 ed., as originally enacted, purported to include all jurisdictional provisions relating to the district courts. Subsequently, many special jurisdictional provisions were enacted and incorporated in other titles of the U. S. C., 1940 ed., as follows:

28 United States Code, Sec. 1341 (As it now reads)

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932.

House Committee Report on above section. Revision of Title 28, United States Code, House Report 308, 80th Congress, 1st Session.

SECTION 1341–SECTION REVISED

Based on title 28, U. S. C., 1940 ed., § 41 (1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21,

1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

This section restates the last sentence of section 41 (1) of title 28, U. S. C., 1940 ed.

Other provisions of section 41 (1) of title 28, U. S. C., 1940 ed., are incorporated in sections 1331, 1332, 1342, 1345, 1354, and 1359 of this title.

Words "at law or in equity" before "in the courts of such State" were omitted as unnecessary.

Words "civil action" were substituted for "suit" in view of rule 2 of the Federal Rules of Civil Procedure.

Words "under State law" were substituted for "imposed by or pursuant to the laws of any State" for the same reason.

Title 47, Section 1576, Louisiana Revised Statutes of 1950.

§ 1576. Payment of tax under protest; remedy at law for recovery

A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Sub-title, shall pay the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice, the amount paid shall be

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segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Subtitle, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such

person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

ASHTON J. MOUTON, COLLECTOR OF REVENUE,
STATE OF LOUISIANA,

Plaintiff,

v.

SINCLAIR OIL AND GAS COMPANY,

Defendant.

CIVIL ACTION No. 68-105

ORDER AND JUDGMENT

This cause came on to be heard on motion of the Plaintiff to remand the same to the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, and on motion of Defendant for summary judgment and on cross-motion of the Plaintiff for summary judgment, and the Court having considered the record of the cause in the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, attached to Defendant's petition for removal, including the stipulation of the parties, and having heard the argument of counsel, and due deliberation having been had thereon, it is.

(1) Ordered that this Court has jurisdiction of this cause, and, therefore, Plaintiff's motion to remand be, and it is hereby, denied;

(2) Ordered that Plaintiff's cross-motion for summary judgment be, and it is hereby, denied;

(3) Ordered, the Court finding that upon the pleadings and admissions on file that there is no genuine issue as to any fact herein, that, as a matter of law, Defendant is entitled to the relief prayed for in its motion for a summary judgment for the reasons and conclusions set out by the Fifth Circuit Court of Appeals in Mississippi River Fuel Corporation v. Cocreham, 382 F. 2d 929 (5th Cir. 1967), writs refused 88 S. Ct. 1264 (1968), that, accordingly, Defendant's said motion for summary judgment be, and the same is hereby, granted, and that the Plaintiff have and recover nothing by his suit.

DATED July 31, 1968

E. GORDON WEST
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Emmett E. Batson, attorney of record for petitioner, do hereby certify that I have this day served a copy of the foregoing order and judgment on the Solicitor General of the United States and on the attorney of record for the respondent as shown below by depositing same in the United States Post Office with sufficient air mail postage prepaid to those over 500 miles away and first class postage to those less than 500 miles distant.

Emmett E. Batson

EMMETT E. BATSON
Counsel of Record

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Solicitor General of the United States
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Office-Supreme Court, U.S.
FILED
AUG 21 1969
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Supreme Court of the United States

OCTOBER TERM, 1969

No. 383

ASHTON J. MOUTON, COLLECTOR OF REVENUE, STATE OF LOUISIANA,
Petitioner,

versus

SINCLAIR OIL & GAS COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS.

Page

STATEMENT OF CASE 1

ARGUMENT:

(1) This Cause Was Removable On Account Of Diversity Of Citizenship 5

(2) This Cause Was Removable In View Of The Presence Of Federal Questions 8

(A) Stipulation Constitutes "Other Paper" Under 28 U.S.C., § 1446 9

(B) The Court Can Take Judicial Notice That Federal Law Is Brought Into Play By The Collector's Petition, Coupled With The Stipulation 12

(C) The Collector Has Injected An Act Of Congress As An Element Of His Cause Of Action 17

(D) Even If Louisiana Is Real Party Plaintiff, This Cause Is Removable 17

THE COLLECTOR'S PETITION FOR CERTIORARI 19

Question 1 20

Question 2 24

TABLE OF CONTENTS—(Continued):

Page

CONCLUSION 32

CERTIFICATE OF SERVICE 33

APPENDIX A:
(Stipulation of Facts) 35

APPENDIX B:
(Judgment of District Court in suit of Collector vs. Sinclair) 39

APPENDIX C:
(Opinion of Circuit Court of Appeals in Shell Oil Company vs. Ashton J. Mouton and in Ashton J. Mouton vs. Shell Oil Company) .. 41

APPENDIX D:
(LSA-R.S. 47:1574) 46

APPENDIX E:
(LSA-R.S. 47:1561) 48

TABLE OF AUTHORITIES.

Page

Cases:

Ames v. State of Kansas, 111 U.S. 449, 4 S.Ct. 437, 28 L.ed. 482 (1884) 19

J. I. Case Co. v. Borak, 377 U.S. 426, 434, 84 S.Ct. 1555, 1561 (1964) 26

Central Metal Products v. International Union, etc., 195 F.Supp. 70 (1961) 13

TABLE OF AUTHORITIES—(Continued):

Page

Cases—(Continued):

Cohens v. Virginia, 6 Wheat. 264, 5 L.ed. 257 (1821) 12

Deauville Associates v. Lojoy Corporation, 181 F.2d 5 (1950) 16

Downey v. Geary-Wright Tobacco Co., 39 F.Supp. 33 (1941) 13

Fisher v. United Airlines, Inc., 218 F.Supp. 223 (1963) 10

Fuqua v. Gulf, Colorado and Sante Fe Railway Company, 206 F.Supp. 814 (1962) 10

Georgia R. & Bkg. Co. v. Redwine, 342 U.S. 299, 72 S.Ct. 321, 96 L.ed. 335 (1952) 6

Gilardi v. Atchison, Topeka and Sante Fe Railway Co., 189 F.Supp. 82 (1960) 11

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.ed. 1407 (1943) 29

Greene v. Louisville and I. R. Co., 244 U.S. 499, 37 S.Ct. 673, 61 L.ed. 1280, 1285 (1917) 6

Harrison v. N.A.A.C.P., 360 U.S. 167, 79 S.Ct. 1025, 3 L.ed.2d 1152 (1959) 31

City of Houston v. Standard-Triumph Motor Company, 347 F.2d 194 (5th Cir. 1965), cert. denied, 382 U.S. 974, 86 S.Ct. 539, 15 L.ed. 2d 466 (1966) 31

Humble Pipe Line Co. v. W. E. Waggonner, Sheriff, etc., 376 U.S. 369, 84 S.Ct. 857, 11 L.ed.2d 782 (1964) 17, 21, 28, 32

TABLE OF AUTHORITIES—(Continued):

Page

Cases—(Continued):

Kaiser Steel Corporation v. Ranch Company, 391 U.S. 593, 88 S.Ct. 1753, 20 L.ed.2d 835 (1968) 31

Kansas City Southern Ry. Co. v. Daniel, 180 F.2d 910, 914 (5 Cir. 1950) 6

Leiter Minerals, Inc. v. United States, 352 U.S. 220, 77 S.Ct. 287, 1 L.ed.2d 267 (1957) 30

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S.Ct. 1070, 3 L.ed.2d 1058 (1959) 30

Mater v. Holley, 200 F.2d 123 (5th Cir. 1952) 16

Mississippi River Fuel Corporation v. Cocreham, 382 F.2d 929 (1967), writs refused 88 S.Ct. 1264 (1968) 3, 4, 5, 7, 8, 9, 11, 15, 16, 17, 21, 24, 32

Ashton J. Mouton, Collector of Revenue, State of Louisiana v. Shell Oil Company, No. 26,751, 5th Cir. Court of Appeals 25

Murphy Oil Corporation v. Fontenot, 225 La. 379, 73 So.2d 180 (1954) 27

New Orleans, M. & T. R.R. Co. v. Mississippi, 102 U.S. 135, 26 L.ed. 96 (1880) 17

S. E. Overton Co. v. International Brotherhood, etc., 115 F.Supp. 764 (1953) 14

Putterman v. Daveler, 169 F.Supp. 125 (1958) 11

Geo. D. Roper Corporation, Newark Div. v. Local Union No. 16, 279 F.Supp. 717 (1968) 16

Shell Oil Company v. Ashton J. Mouton, Collector of Revenue, State of Louisiana, No. 26,493, 5th Cir. Court of Appeals 21, 24, 25, 26, 32

TABLE OF AUTHORITIES—(Continued):

Page

Cases—(Continued):

Surplus Trading Company v. Cook, 281 U.S. 647, 652, 50 S.Ct. 455, 457, 74 L.ed. 1091, 1095 (1930) 15

Ex parte: Edward T. Young, Petitioner, 209 U.S. 123, 28 S.Ct. 441, 52 L.ed. 714 (1908) 5, 7

Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.ed.2d 444 (1967) 29

United States Constitution and Statutes:

Article I, Section 8, Clause 17, United States Constitution 8, 11, 15, 16

4 U.S.C., Secs. 104-110 17

28 U.S.C., Sec. 1332 5

28 U.S.C., Sec. 1341 ..... 20, 21

28 U.S.C., Sec. 1446 (b) 9, 10, 12

Louisiana Statutes:

LSA-R.S. 47:1561 23

LSA-R.S. 47:1574 22

LSA-R.S. 47:1576 23

Congressional Service:

U. S. Code Congressional Service, 1949, Vol. 2, page 1268 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 383.

ASHTON J. MOUTON, COLLECTOR OF REVENUE, STATE OF LOUISIANA,
Petitioner,

versus

SINCLAIR OIL & GAS COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

STATEMENT OF CASE.

This brief in opposition to the petition of Ashton J. Mouton, Collector of Revenue of the State of Louisiana, for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is filed under the authority of Rule 24.

For the reasons set forth below, it is respectfully submitted that the petition for a writ of certiorari should be denied.

This action involves the right of the Plaintiff (sometimes hereinafter called the Collector), to exact severance taxes on distillate and gas produced by Defendant (sometimes hereinafter called Sinclair), from lands affected by an oil and gas lease from the United States in favor of Sinclair, which lands form an integral part of Barksdale Air Force Base (sometimes hereinafter called the Base), and which lands have at all times pertinent hereto been utilized by the United States for military purposes.

The Collector commenced this action in the 19th Judicial District in and for the Parish of East Baton Rouge, State of Louisiana, Number 127,415 on the docket of said Court. Thereafter the Collector entered into a stipulation and same was filed in the record. Such stipulation, after stating that the United States executed in favor of Sinclair an oil and gas lease covering certain lands embraced in the Base, further states:

> "The severance tax claimed herein is on distillate and gas produced by Sinclair Oil & Gas Company under its said lease from the United States from the lands described in such lease."[1]

Sinclair then removed this cause to the United States Court for the Eastern District of Louisiana, Baton Rouge Division, alleging that said Court had original jurisdiction (i) because of diversity of citizenship and (ii) be-

---

[1] The stipulation is reproduced except for the exhibits, in Appendix A hereof.

cause the cause arises under the laws and constitution of the United States.

After the petition for removal had been filed, Sinclair filed a motion for summary judgment based upon the holding of the United States Court of Appeals for the Fifth Circuit in the case of *Mississippi River Fuel Corporation v. Cocreham*, 382 F.2d 929 (1967), writs refused 88 S.Ct. 1264 (1968) (sometimes hereinafter referred to as *Mississippi River*). Ashton J. Mouton, the plaintiff in the action now before this Court was a party defendant in *Mississippi River*, and that case held that the Collector, on behalf of Louisiana, was without right to collect severance taxes on oil and gas produced from lands embraced in the Base for the reason that under the United States Constitution the United States has exclusive jurisdiction over the Base.

The Collector filed a motion to remand the cause to the state court, taking the position that it was not removable because (1) the state is the plaintiff, and, therefore, there is no diversity; (2) there is no federal question involved except by way of defense; and (3) the federal court had no jurisdiction of the subject matter.

The Collector also filed a counter-motion for summary judgment, alleging that in the event his motion to remand is not granted the court should grant to him a summary judgment for the severance taxes forming the basis of his action.

The District Court

(1) held that both diversity and a federal question were present and that it had jurisdiction of the cause, and therefore, denied the Collector's motion to remand;

(2) denied the Collector's cross-motion for summary judgment;

(3) found that upon the pleadings and admissions on file there was no genuine issue as to any fact; that, as a matter of law, Sinclair was entitled to the relief prayed for in its motion for summary judgment for the reasons and conclusions set out by the Fifth Circuit Court of Appeals in *Mississippi River*, and, accordingly, granted Sinclair's motion for summary judgment. (Copy of the judgment of the District Court is reproduced in Appendix B hereof.)

In the District Court the Collector in his motion for summary judgment alleged:

> "Assuming that the United States does have exclusive jurisdiction over Barksdale Air Force Base the right of the State of Louisiana to apply its severance tax to oil and gas produced on said base was retroceded to Louisiana by the Buck Act, 4 U.S.C., Sections 104-110."

ARGUMENT.

The Courts Below Properly Held This Cause Removable From The State Court To The Federal Court.

(1) This Cause Was Removable On Account Of Diversity Of Citizenship.

It is recognized that a state is not a citizen and that if Louisiana is the real party, this action cannot be removed on the ground of diversity of citizenship under 28 U.S.C. 1332. However, it is Sinclair's position that the Collector is acting herein unconstitutionally in view of the decision in *Mississippi River Fuel Corporation v. Cocreham*, 382 F.2d 929 (1967), writs refused 88 S.Ct. 1264 (1968), (Ashton J. Mouton, the Collector, having been made a party defendant therein), for said decision judicially advised the Collector that he is without right, individually or on behalf of Louisiana, to exact severance taxes on production of oil and gas from lands embraced in Barksdale Air Force Base because of the fact that the United States has exclusive jurisdiction over the Base; and, therefore, he, the Collector, individually, and not the State of Louisiana, is the true plaintiff in this action.

Pertinent is *Ex parte: Edward T. Young, Petitioner*, 209 U.S. 123, 28 S.Ct. 441, 52 L.ed. 714 (1908), wherein the court stated:

> "The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to

> the injury of complainants is a proceeding without the authority of, and one which does not, affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

See also *Greene v. Louisville and I. R. Co.*, 244 U.S. 499, 37 S.Ct. 673, 61 L.ed. 1280, 1285 (1917).

As stated in *Kansas City Southern Ry. Co. v. Daniel*, 180 F.2d 910, 914 (1950):

> "The decisions with great uniformity, hold that a suit seeking to restrain an official from an alleged unconstitutional exercise of power, *or from action under a statute that would be violative of constitutional rights when applied in a particular situation,* is not a suit against the State, within the purview of the Eleventh Amendment." (Citing numerous authorities.) (Emphasis supplied.)

In the case of *Georgia R. & Bkg. Co. v. Redwine*, 342 U.S. 299, 72 S.Ct. 321, 96 L.ed. 335 (1952), the Revenue Commissioner of Georgia sought to collect ad valorem taxes, which taxation it was claimed was

contrary to the legislative charter of the appellant. The district court characterized appellant's action as one to enforce a contract with the State of Georgia, and as such, a suit against Georgia. However, in reversing the lower court, this Court stated:

> "The District Court characterized appellant's action as one to enforce an alleged contract with the State of Georgia, and, as such, a suit against the State. But appellant's complaint is not framed as a suit for specific performance. *It seeks to enjoin appellee from collecting taxes in violation of appellant's rights under the Federal Constitution.* This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State. These decisions were re-examined and re-affirmed in Ex parte Young, 209 U.S. 123, 52 L.ed. 714, 28 S.Ct. 441, 13 LRA NS 932, 14 Ann Cas 764 (1908), and have been consistently followed to the present day. This general rule has been applied to suits against individuals threatening to enforce allegedly unconstitutional taxation, including cases where, as here, it is alleged that taxation would impair the obligation of contract." (Emphasis supplied.)

We do not have a situation where the acts of an officer of a state are merely claimed to be unconstitutional, for in *Mississippi River* the Collector's acts were adjudged to be unconstitutional. The point involved here has long since been settled by *Ex parte Young, supra*, and many cases have cited it with approval, including *Mississippi River*. By his own admissions the Collector is attempting to collect severance taxes

on distillate and gas produced by Sinclair under a lease from the United States from lands embraced within Barksdale Air Force Base, the exclusive jurisdiction of which is in the United States. In *Mississippi River* it was held, because of the Constitution of the United States, more particularly Article I, Section 8, Clause 17, the Collector could not exact taxes which he claimed were due by Mississippi River Fuel Corporation and which are identical to the taxes which plaintiff, the Collector, is claiming in this suit. Here, Sinclair is seeking no affirmative relief against the state as a sovereign but is merely seeking to prohibit the Collector from applying a taxing statute which the courts have held cannot be applied to Sinclair's activities on the Base. Because of his unconstitutional claim he has lost his identity as an "agent" of the sovereign, and, as a result, occupies the role of an individual citizen.

In view of the above decisions, it seems clear that the Collector, is the real party plaintiff in this action, and, accordingly, that this is an action which is removable on the ground of diversity of citizenship. The Court of Appeals so ruled.

(2) This Cause Was Removable In View Of The Presence Of Federal Questions.

The Collector's complaint alleges that Sinclair "severed from Sligo Field in Bossier Parish, Louisiana, distillate and natural gas on which severance tax due to the State of Louisiana in the amount of $507,790.03 has not

been paid." After the complaint was filed the Collector, as heretofore stated, stipulated that the distillate and natural gas, with respect to which he claims severance taxes, were produced by Sinclair from lands embraced in the Base, and said stipulation constituted a part of the state court record.

(A) Stipulation Constitutes "Other Paper" Under 28 U.S.C. § 1446.

Let us consider the impact of the stipulation and see whether it should be considered along with the complaint, as both the District Court and the Court of Appeals ruled it should be. In this connection it is pertinent to discuss 28 U.S.C., Section 1446, entitled, "Procedures for Removal", and cases arising thereunder. The second paragraph of subsection (b) provides:

> "If the case stated in the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order *or other paper* from which it may first be ascertained that the case is one which is or has become removable." (Emphasis supplied.)

In *Mississippi River* a federal question was involved, i.e., the right of Louisiana to exact taxes on the severance of oil and gas under leases from the United States from lands embraced in the Base; and therein it was held that the State could not exact such taxes for the reason that under the Constitution of the United States (Article I, Section 8, Clause 17), the federal government had exclusive jurisdiction over the Base. By virtue of the stipulation, voluntarily

entered into, it becomes obvious that the same federal question is involved here. The only question is whether the stipulation should be classified as "other paper" which, upon being filed in the state court record, entitled Sinclair under the provision of 28 U.S.C., § 1446, to remove the cause from the state court to the federal court. The answer to the question should be in the affirmative.

In *Fuqua v. Gulf, Colorado and Santa Fe Railway Company*, 206 F.Supp. 814 (1962), the court had occasion to interpret the meaning of the term "other paper." The defendant took the position that a deposition taken by him disclosed for the first time that the case was removable. Quoted from that case is the following:

> "The discovery deposition taken by the plaintiff was taken pursuant to the laws of Oklahoma authorizing the same and was such 'other paper' within the meaning of Section 1446 (b) from which defendant first ascertained that the case was removable and defendant had 20 days thereafter to remove the case."

In *Fisher v. United Airlines, Inc.*, 218 F.Supp. 223 (1963), appears the following:

> " 'The case stated by the initial pleading,' therefore, was not removable. Defendants claim that they first learned that plaintiff was a citizen, as well as a resident, of New Jersey, when they examined plaintiff before trial on February 8, 1963.
>
> "It has been held that an answer given by a party on a deposition is a 'paper' within the meaning of the removal statute.

"Defendants have thus made literal compliance with the statute, since they filed their petition for removal on February 21, 1963, within twenty days after the receipt by them of a paper establishing plaintiff's citizenship and thus the requisite diversity."

From *Gilardi v. Atchison, Topeka and Santa Fe Railway Co.*, 189 F.Supp. 82 (1960), is quoted:

"Plaintiff's discovery deposition taken pursuant to Illinois Supreme Court Rule 19, even though not required to be filed, was a sufficient 'other paper' within the meaning of Section 1446 (b) from which defendant first ascertained that the cause was removable. . ."

See also *Putterman v. Daveler*, 169 F.Supp.125 (1958).

It is submitted that a stipulation voluntarily entered into by the plaintiff and filed in the record, and becoming a part thereof for all purposes, is such a document which should be considered in determining that a case is removable. The use of the stipulation merely obviated the necessity of establishing the same facts by the formal procedure of taking the deposition of the Collector. By virtue of the stipulation, it becomes amply clear that the Collector, in the face of *Mississippi River*, is asserting that he is entitled to collect severance taxes from Sinclair on production from the Base. Therefore, by virtue of the stipulation, he has now effectually cast his claim as one arising under the laws and Constitution of the United States, for *Mississippi River* ruled that a provision of the Constitution of the United States (Article I, Section 8, Clause 17) was determinate of the rights of the parties.

(B) The Court Can Take Judicial Notice That Federal Law Is Brought Into Play By The Collector's Petition, Coupled With The Stipulation.

The second paragraph of 28 U.S.C., Section 1446 (b) came into being in 1949. Prior to its enactment there was no statutory provision for the removal of cases which were not removable at the time they were filed, but in which the circumstances preventing removal had been done away with. However, prior to its enactment the courts had held a cause could be removed when the feature preventing removability had been eliminated, even though the specified time for removal had expired. According to the legislative history of the act, 28 U.S.C., Section 1446 (b), was only declaratory of the rule as laid down by the decisions. *U. S. Code Congressional Service*, 1949, Vol. 2, page 1268.

So, apart from the stipulation constituting "other paper", it is submitted that the Collector's complaint, along with his admission, reveals the presence of a federal question, and the court can take judicial notice of such fact, as is disclosed by decisions rendered prior to and after the enactment of the second paragraph of said section.

In the case of *Cohens v. Virginia*, 6 Wheat. 264, 5 L.ed. 257 (1821), the court said:

> "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either."

From *Central Metal Products v. International Union, etc.*, 195 F.Supp. 70 (1961), is quoted the following:

> ". . . Here the plaintiff's complaint does not disclose whether he relies upon state or federal law, but even assuming that plaintiff intended reliance only upon non-federal ground, still if his complaint, fairly construed, reveals that his cause of action raises a question of violation of a contract with a labor organization representing employees in an industry affecting commerce, as defined in the Taft-Hartley Act, where the plaintiff is, himself, an employer in such industry, then the action is removable although some of the particulars required for federal jurisdiction must be made plain in the petition for removal."

In *Downey v. Geary-Wright Tobacco Co.*, 39 F.Supp. 33 (1941), the right of removal was at issue. The plaintiff for himself and others there sued a company conducting a public tobacco warehouse, alleging that the company made illegal deductions from amounts realized for crops, and prayed for a money judgment and for an accounting. The plaintiff contended that his petition disclosed nothing more than a cause of action for money had and received and insisted that same did not disclose a case arising under the laws of the United States. The court took judicial cognizance of the fact that the marketing of tobacco constitutes an industry which affects interstate commerce, that the acts complained of in the complaint raised questions affecting such commerce, and then went on to say:

> "That the plaintiff does not rely upon 'any law regulating commerce' does not leave the suit beyond the reach of federal jurisdiction under Section 24 (8) of the

Jud. Code, 28 U.S.C.A. Sec. 41 (8), *if, as a matter of law, his case must stand or fall or its correct determination depend upon the effect or validity of applicable Congressional legislation enacted under the 'Commerce clause' of the Constitution*, art. 1 sec. 8, cl. 3. (Citing cases)." (Emphasis supplied.)

The case of *S. E. Overton Co. v. International Brotherhood, etc.*, 115 F.Supp. 764 (1953), involved the right of removal of a case where the complaint alleged violation of Michigan's monopoly statute. There the court took judicial cognizance of "Federal Laws necessarily brought into play by the allegations of the complaint," namely the Labor Management Relations Act. From the opinion is quoted the following:

"The complaint does not expressly mention the Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Act, 29 U.S.C.A. Sec. 141, et seq., nor does it mention the Federal statutes relating to interstate commerce. However, *it is fundamental that the court may properly take judicial notice of any Federal laws necessarily brought into play by the allegations of the complaint*, although specific reference to such laws has been omitted. In Dynamic Mfrs., Inc., v. Local 614 of the Gen. Drivers, Warehousemen & Helpers of America, D.C., 103 F.Supp. 651, at page 652, the district court for the Eastern District of Michigan said:

'The fact that the plaintiff in his bill does not identify a Federal statute, does not prevent the court from recognizing the existence of a controversy clearly covered by a Federal statute. The court will take "judicial notice of any Federal laws necessarily brought into play by the allegations of the com-

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> plaint; and it is immaterial that specific reference to such laws may be omitted in the pleading'." (Emphasis supplied.)

Again we say that when plaintiff's petition and his admissions are read together, it becomes clear that this action arises out of the identical Federal questions involved in *Mississippi River*, which this Court can take judicial notice of. Therefore, the Constitution of the United States and its proper interpretation, is just as much in evidence here as it was in *Mississippi River*.

That a federal question is present seems obvious from the following quotation from *Mississippi River*, to-wit:

> ". . . When the United States acquired title to the land, it acquired 'exclusive jurisdiction' over the property, precluding the State's levying and collecting a tax on oil and gas severed from the land by a third party under a lease from the United States. Article I, Section 8, Clause 17, United States Constitution; Humble Pipe Line Co. v. Waggonner, 1964, 376 U.S. 369, 84 S.Ct. 857, 11 L.ed. 2d 782."

Moreover, when the United States acquired exclusive jurisdiction over Barksdale Air Force Base, Louisiana's sovereignty thereover terminated and federal sovereignty thereover became complete and exclusive. *Surplus Trading Company v. Cook*, 281 U.S. 647, 652, 50 S.Ct. 455, 457, 74 L.ed. 1091, 1095 (1930). When the United States takes over the territory of another sovereign with the consent of such sovereign, for the purposes expressed in Article I, Section 8, Clause 17 of the United States Constitution, the

municipal laws of the original government remain in effect, but such laws become laws of the United States. *Mater v. Holley*, 200 F.2d 123 (1952), and *Mississippi River*, 382 F.2d 929, 939.

When Louisiana consented to the purchase of the Base, and, in addition, ceded jurisdiction thereover, there could have been no clearer example of federal law pre-empting all state law; and, accordingly, as we have stated, regardless of what the Collector's petition discloses, when he stipulated that the taxes were claimed on production from the Base, it is inescapable that only federal law is involved. The Collector cannot avoid the force of federal pre-emption over the Base by merely failing to mention or give effect to Louisiana's consent and cession statutes and the effect thereof under Article I, Section 8, Clause 17 of the Constitution of the United States. Compare *Geo. D. Roper Corporation, Newark Div. v. Local Union No. 16*, 279 F.Supp. 717 (1968).

We also have the situation where the Collector is attempting to relitigate in the state court the identical questions decided in *Mississippi River* and have the state court overrule the holding in *Mississippi River* and declare that the Fifth Circuit was wrong in deciding the federal constitutional questions therein presented. Such attempt brings into play a federal question. *Deauville Associates v. Lojoy Corporation*, 181 F.2d 5 (1950).

(C) The Collector Has Injected An Act Of Congress As An Element Of His Cause Of Action.

Aside from all else, the Collector in his motion for summary judgment has alleged that if it is found that the United States has exclusive jurisdiction over the base,[2] Louisiana has the right to collect severance taxes with respect to oil and gas produced on the Base by virtue of the Buck Act, 4 U.S.C., Sections 104-110. He made the same claim in *Mississippi River* (382 F.2d 939), taking the position that when the Congress by such statutes authorized the imposition of income taxes, it thereby authorized the imposition of severance taxes. The Court of Appeals disagreed. Obviously, the Collector is relying upon that federal statute for relief.

(D) Even If Louisiana Is Real Party Plaintiff, This Cause Is Removable.

A case arising under the laws and Constitution of the United States is removable even if Louisiana is the real party plaintiff.

In *New Orleans, M. & T. R.R. Co. v. Mississippi*, 102 U.S. 135, 26 L.ed. 96 (1880), the court held that while the Eleventh Amendment of the Federal Constitution excludes the judicial power of the United States from suits com-

---

[2] The Supreme Court in *Humble Pipe Line Co. v. W. E. Waggonner, Sheriff, etc.*, 376 U.S. 369, 84 S.Ct. 857, 11 L.ed.2d 782 (1964), and this Court in *Mississippi River* unequivocally found exclusive jurisdiction of the Base vested in the United States.

menced or prosecuted against one of the United States by citizens of another state, such power was extended by the Constitution to suits commenced or prosecuted by a state against an individual in which the latter demanded nothing from the former, but only sought the protection of the Constitution and laws of the United States against the claim or demand of the state.

The court said:

"It is settled law, as established by well considered decisions of this court, pronounced upon full argument and after mature deliberation, notably in Cohens v. Virginia, 6 Wheat., 264; Osborn v. Bk., 9 Wheat., 738; Mayor v. Cooper, 6 Wall., 247 (73 U.S. XVIII., 851); Gold-Washing & W. Co. v. Keyes, 96 U.S. 199 (XXIV., 656); and Tennessee v. Davis, 100 U.S. 257 (XXV., 648):

"That, while the 11th Amendment of the National Constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, such power is extended by the Constitution to the suits commenced or prosecuted by a State against an individual, in which the latter demands nothing from the former, but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State;

"That a case in law or equity consists of the right of one party, as well as of the other, and may, properly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either; . . ."

The exact question was presented in *Ames v. State of Kansas*, 111 U.S. 449, 4 S.Ct. 437, 28 L.ed. 482 (1884). The court posed and answered the question thusly:

> "We come now to the question whether a suit brought by a State in one of its own courts, against a Corporation amenable to its own process, to try the right of the Corporation to exercise corporate powers within the territorial limits of the State, can be removed to the Circuit Court of the United States, under the Act of March 3, 1875, ch. 137 (18 Stat. at L., 470), if the suit presents a case arising under the laws of the United States. The language of the Act is 'Any suit of a civil nature * * * brought in any state court * * * arising under the Constitution or laws of the United States', may be removed by either party. This is broad enough to cover such a case as this, unless the language is limited in its operation by some other law, or by the Constitution. The statute itself makes no exception of suits to which a State is a party."

THE COLLECTOR'S PETITION FOR CERTIORARI.

The Collector has presented two questions for review, namely:

"1.

> "Under federal law does a federal district court have jurisdiction of a suit to determine the legality of state taxes when the State involved provides the taxpayer a plan, speedy and efficient remedy in its own courts for the contest of the taxes asserted by the State?

"2.

"In the alternative, only in the event this Court determines question number one adverse to the Collector, is the federal district court required to stay its hand until the question of the legality of a State tax is determined in the state court when the question is there pending?"

These questions will be discussed in their order.

Question 1.

Although the Collector states in his petition that he moved in the district court to remand the case to the state court on the ground that the Collector was acting for Louisiana in his official capacity and since a state is not a citizen there was no diversity, he makes no attempt to develop an argument on the point. He pitches his argument solely on the proposition that the federal court has no jurisdiction under federal law, citing 28 U.S.C. § 1341, which provides that the district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the courts of such state. He then says Louisiana provides for an adequate remedy, and, therefore, the federal court lacks jurisdiction under the cited statute.

We point out that the cited federal statute, i.e.. 28 U.S.C. § 1341, was not remotely intended to apply to a situation where the collector as an individual is proceeding in an unconstitutional manner to collect taxes which the courts have held could not be collected. By its plain language it refers to an assessment levy, or collection under state

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law. The Collector is proceeding in the face of three adjudications in which it has been held that Louisiana's tax laws are inoperable with respect to property situated on the base and with respect to oil and gas severed from the Base. This Court ruled in *Humble Pipe Line Co. v. Waggonner*, that ad valorem taxes could not be collected on property situated on the Base. The United States Court of Appeals, Fifth Circuit, ruled in *Mississippi River* and in *Shell Oil Company v. Ashton J. Mouton, Collector of Revenue, State of Louisiana*, No. 26,493 on the Docket of the United States Court of Appeals, Fifth Circuit,[3] that Louisiana could not impose severance taxes on oil and gas produced under leases from the United States from lands embraced in the Base. Louisiana was the defendant in the last two cases. And yet, in the very face of such adjudications, the Collector is here seeking to collect from Sinclair severance taxes on oil and gas produced under a lease to Sinclair from the United States from lands embraced in the Base.

It appears obvious, therefore, that the Collector's argument regarding the effect and meaning of 28 U.S.C. § 1341 is irrelevant to the issues here involved.

Moreover, even if the state is the plaintiff, same would not be relevant, for Sinclair is not attacking the constitutionality of the Louisiana statute imposing a severance tax and is not seeking an injunction against the state, as the Collector in his argument seems to assume is the case.

[3]This latter case was consolidated with the action against Sinclair for which the Collector seeks certiorari herein. No petition for certiorari was sought in the *Shell Oil* case and same has become final. A copy of the opinion of the Court in that case is attached as Appendix C hereof.

Sinclair, as a defendant, is only saying that such statute has no application to the activities of Sinclair on the Base. Certainly it has the right in the federal court to contest on that ground the action of the Collector acting as an individual, for there would be present diversity, or, for that matter, if he is so acting, as an agent of the state, for there would be present a federal question.

As demonstrated under the subhead (D) hereof, commencing on page 17, if the State is the suitor, and a federal question is involved, Sinclair can remove to the federal court. The eleventh amendment of the federal constitution does not prevent the defendant from doing so.

The Collector cites no holding of any court in support of his theory, and relies altogether upon his interpretation of the meaning of what he terms a "debate" with respect to an amendment of the judiciary act, which debate related to suits by public utilities.

The Collector has seen fit to institute his action as a summary proceeding. By referring to the statute under which he proceeds (L.S.A.-R.S. 47:1574),[4] it can be seen that all he has to do to make out a prima facie case is to attach an affidavit that all the facts alleged are true to the best of his knowledge, and after he has done that the burden shifts to Sinclair to develop the true basis for the Collector's claim and establish that same is without merit. The Collector alleges no notice to, or demand upon, or an assessment against, Sinclair to pay the taxes and in fact,

[4] Reproduced in Appendix D hereof.

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no notice, demand, or assessment was given or made regarding the taxes claimed. His whole argument appears to be that the federal court is without jurisdiction, and alternatively, as is urged in his question 2, if it has jurisdiction, it should abstain until the state courts pass upon the question, all on account of Louisiana having provided a plain, speedy, and efficient remedy in its own courts, namely, Title 47, Louisiana Revised Statute (1950), Section 1576.[5] (Such statute appears on pages 44-46 of the Collector's petition.)

In making such argument the Collector loses sight of the fact that, by virtue of his proceeding summarily, even though it be conceded that he is acting for the State, Sinclair has been denied the right to proceed under Title 47, Louisiana Revised Statute, Section 1576, and the Collector is seeking recovery of items, such as interest and attorney's fees, which would not be due if a demand for the taxes had been made and Sinclair had proceeded under the statute. We say that Sinclair has been denied such right because LSA-R.S. 47:1561 provides in part as follows:

> "In addition to following any of the special remedies provided in the various Chapters of this Subtitle, the collector may, within his discretion, proceed to enforce the collection of any taxes due under this Subtitle, by means of any of the following alternative remedies or procedures:
>
> * * * * * *

[5] This statute provides a legal remedy in the state or federal courts.

"(2) Summary court proceeding, as provided in R.S. 47:1574.

* * * * * *

"The Collector may choose which of these procedures he will pursue in each case, and the counter-remedies and delays to which the taxpayer will be entitled will be only those which are not inconsistent with the proceeding initiated by the Collector; provided that in every case the taxpayer shall be entitled to proceed under R.S. 47:1576 except after he has filed a petition with the board of tax appeals for a redetermination of the assessment, and *except when there is pending against him a suit involving the same tax obligation*; and provided further, that the fact that the collector has initiated proceedings under the assessment and distraint procedure will not preclude him from thereafter proceeding by summer or ordinary court proceedings for the enforcement of the same tax obligation." (Emphasis supplied.)

The Collector advanced this identical argument in the Court of Appeals in *Mississippi River* and in *Shell Oil Company vs. Ashton J. Mouton*. The Court of Appeals did not agree holding that it had jurisdiction. The Collector repeated such argument in his petition to this Court for certiorari in *Mississippi River*, which petition was denied.

Question 2.

If the Collector is proceeding unconstitutionally herein, it would seem obvious that he is without right, as an individual, to ask for abstention so that the state court could pass

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upon Louisiana statutes granting to the United States the consent of Louisiana to acquire the Base and ceding Louisiana's jurisdiction thereover to the United States. Any interpretation the state court would make with respect to the statutes would be of no avail to him. Only if the state is the plaintiff could the question of abstention have any possible relevancy, and even then abstention should be denied.

As before stated, this case and the case of *Shell Oil Company v. Ashton J. Mouton, Collector of Revenue, State of Louisiana*, No. 26,493 on the Docket of the United States Court of Appeals, Fifth Circuit, were consolidated for argument in the Court of Appeals, Fifth Circuit. Another case, that of *Ashton J. Mouton, Collector of Revenue, State of Louisiana vs. Shell Oil Company*, No. 26,751 on the Docket of said Court, was also consolidated, for argument, with the above two cases.

The latter case referred to in the next preceding paragraph was instituted in the state court by the Collector against *Shell Oil Company* for a declaratory judgment to the effect that the federal court had no jurisdiction in the case of *Shell Oil Company v. Ashton J. Mouton, Collector of Revenue of the State of Louisiana*, No. 26,493, then pending, and in which Shell Oil had deposited under protest sums claimed as severance taxes on oil and gas produced from the Base, which case was decided against the Collector and which has now become final; and that Louisiana had not agreed that oil and gas produced from the Base was beyond its taxing authority. At the same time the Collector filed a motion with the federal court requesting that the federal court abstain in said suit.

The District Court and the Court of Appeals denied the motion to abstain. Quoted from the opinion of the Court of Appeals is the following:

> "Nor should we abstain while the Collector seeks a declaration from Louisiana state courts on the question of federal jurisdiction. The propriety of levying taxes on a federal military installation where exclusive jurisdiction resides in the Federal Government under the plain provisions of Article I, Section 8, Clause 17, of the United States Constitution, presents a substantial federal question for decision. The federal courts must determine issues of law pertaining to federal jurisdiction. The fact that questions of state law must be decided does not change the character of the right which remains federal. J. I. Case Company v. Borak, 377 U.S. 426, 434, 84 S.Ct. 1555, 1561 (1964). Our decision in Mississippi River Fuel solved that issue by its holding that the federal court was a proper forum in circumstances identical with those here." (Appendix C hereof.)

In *J. I. Case Co. v. Borak*, cited in *Shell Oil Company*, the plaintiff sought to enjoin a proposed merger on various grounds, including breach of fiduciary duties of the directors of one of the concerns involved, misrepresentations contained in materials circulated to obtain proxies and for damages. A lower court decision was to the effect that the equitable relief and damages prayed for would be available only under state law, and when the plaintiff failed to provide the security as fixed by the court under the state law the claim was dismissed. Certiorari was granted by this Court on the question of the right to damages under federal law. In disposing of the question, the Supreme Court said:

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"*But we believe that the overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law, for it 'is not uncommon for federal courts to fashion federal law where federal rights are concerned.'* Textile Workers v. Lincoln Mills, 353 U.S. 448, 457, 1 L.ed. 2d 972, 981, 77 S.Ct. 912 (1957). *In addition the fact that questions of state law must be decided does not change the character of the right; it remains federal.* As Chief Justice Marshall said in Osborn v. Bank of the United States, 9 Wheat. 738, 6 L.ed. 204, (1824):

> 'If this were sufficient to withdraw a case from the jurisdiction of the federal Courts, almost every case, although involving the construction of a law would be withdrawn . . . .' At 819-820, 6 L.ed. 223, 224." (Emphasis supplied.)

The required elements for the court properly to consider abstention are an uninterpreted state statute where one interpretation will give rise to the federal constitutional question, whereas another interpretation will relieve the necessity therefor. Neither element is present here. There is no question raised of any constitutional clash between the state severance tax law and the United States Constitution so that the Constitution will render the tax invalid. It is simply a question of the limitation of tax levy, namely, that the levy cannot go into the federal enclave because the United States enjoys exclusive jurisdiction thereover.

On page 17 of the Collector's petition, he summarizes litigation involving the Base. He first points to the case of *Murphy Oil Corporation v. Fontenot*, 225 La. 379, 73 So.2d

180 (1954), and states that the legality of the tax was upheld by the Louisiana Supreme Court. In that case appears the following:

> "Act No. 12 of 1892, as amended, LSA-R.S. 52:1, was a legislative consent of the State of Louisiana to the donation of the lands herein involved. This consent was evidence, as shown from the facts, that property was exempt from taxation as long as it was used for military purposes. *Exclusive legislative jurisdiction was granted to the federal government over the Air Base.*" (Emphasis supplied.)

The Louisiana Court held the taxes collectible because, in its opinion, the lands leased were not being used for military purposes, and, for that reason, the United States had relinquished its jurisdiction thereover, and the lease obligated the lessee to pay the same. This Court in *Humble Pipe Line Co. vs. Waggonner*, after holding the same as the Louisiana court did with respect to the United States having exclusive jurisdiction over the Base, held to the contrary on both of the above points. However, in said case, the Louisiana court determined the meaning and effect of Louisiana's statutes consenting to the acquisition by the United States of the lands embraced in the Base; and, in view of that fact alone, the Collector's whole argument for abstention falls of its own weight.

As stated above, the elements required for a court to consider equitable abstention are uninterpreted ambiguous state statutes. The Louisiana statutes consenting to the acquisition of the Base by the United States are clear and un-

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ambiguous.[6] As before stated, the Louisiana court has already found that the effect thereof was to vest in the United States exclusive legislative jurisdiction over the Base, and this Court and the Court of Appeals have reached the same conclusion.

Moreover, there is no "special circumstance" involved here which would justify the invocation of the doctrine of abstention. Compare *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.ed.2d 444 (1967).

In support of his argument that the federal court abstain, the Collector cites and quotes from *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.ed. 1407 (1943). Equitable abstention was not involved in that decision. It was not asked for and the court did not suggest it. The case dealt with the unavailability of equitable remedy in face of an adequate remedy at law. The taxpayer there had filed in federal court a declaratory judgment suit seeking a declaration that certain taxes were invalid. At page 21 of his petition the Collector quotes from the per curiam of this Court in granting writs, in which the Court asked counsel to discuss whether declaratory judgment procedure could be properly used in that case in face of the adequate remedy at law. The quotation in the Collector's petition is so posed as to give the impression that the court was inviting discussion as to the appropriateness of a State court suit for declaratory judgment. Such is not the case. The court was talking about the declaratory judgment suit which

[6] The Louisiana statutes consenting to purchase and ceding jurisdiction are reproduced in Appendix E hereto.

was then being reviewed by it and merely invited comments on the procedural aspect of the matter. The case has no connection with equitable abstention.

The Collector cites the case of *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 77 S.Ct. 287, 1 L.ed.2d 267 (1957) in support of his argument for abstention. That case involved a situation where one view of the uninterpreted state statute, ambiguous as to its prospective application, would lead to perplexing federal constitutional issues and another imterpretation would entirely avoid such issues—elements that are not present here—for Louisiana's consent statutes have been found clear and unambiguous by both the state and federal courts. However, it is significant that when the declaratory judgment action got to the Louisiana Supreme Court that Court said that as between litigants it had consistently refused to render advisory opinions, and, further, that any opinion it rendered would not terminate the uncertainty of the controversy. The court made it clear that it was rendering the decision out of respect for and as a courtesy to the United States Supreme Court and that in so doing the rendition of such opinion was to be considered exceptional, not to be followed.

In *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.ed.2d 1058 (1959), cited by the Collector, the question was whether expropriation of rights of way by the plaintiff could be exercised against the City of Thibodaux, a governmental subdivision of the state. Equitable abstention was granted because of the internal relationship between the state and its creature. No such consideration is involved here.

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The Collector also cites and quotes from *City of Houston v. Standard-Triumph Motor Company*, 347 F.2d 194, (1965) cert. denied, 382 U.S. 974, 86 S.Ct. 539, 15 L.ed. 2d 466 (1966). Equitable abstention was not involved in that case either by suggestion of counsel or suggestion of the court. It dealt with the same question of availability of equitable remedy in face of adequate remedy at law.

Also in support of his equitable abstention point the Collector cites *Kaiser Steel Corporation v. Ranch Company*, 391 U.S. 593, 88 S.Ct. 1753, 20 L.ed.2d 835 (1968), which dealt with water rights in the arid state of New Mexico. Because of the overwhelming importance of water rights, not only to the State but to all the citizens of New Mexico, "special circumstances" were noted and equitable abstention was granted.

The final case cited by plaintiff is *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 79 S.Ct. 1025, 3 L.ed.2d 1152 (1959), which dealt with certain statutes of Virginia relative to associations which the N.A.A.C.P. claimed were oppressive. The Court found the statutes involved ambiguous and complicated, an element not found here. The delicate relation between the federal judiciary and the states and the race relations involved is obvious, and, because of those two elements, abstention was granted.

CONCLUSION.

There is diversity present in this cause concerning which the Collector raises no genuine issue. Also there is a federal question present concerning which the Collector raises no genuine issue. The Collector does not question the judgment below on the merits. The federal court has jurisdiction, as determined by this Court in *Humble Pipe Line Company v. Waggonner*, and as determined by the Court of Appeals in *Mississippi River Fuel Corporation v. Cocreham* and in *Shell Oil Company v. Ashton J. Mouton*. The doctrine of equitable abstention is not applicable since the Collector is acting herein as an individual. Moreover, if he is not so acting, such doctrine is not applicable for the federal court is concerned with the provision of the United States Constitution and in passing upon that question is vested with the right to interpret state law appertaining thereto. This Court, the Louisiana Supreme Court and the Court of Appeals have in the past all reached the same conclusion on the effect of Louisiana's consent and cession statutes, i.e., that such statutes, when considered along with the federal constitution, had the effect of vesting exclusive jurisdiction of the Base in the United States.

Rule 19 of the rules of this Honorable Court lists considerations governing granting of certiorari, pointing out that this is a matter of sound discretion rather than a right. It is suggested that none of the criteria set out in the rule are applicable in this case.

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It is urged that the petition for writ of certiorari be denied.

Respectfully submitted,

.....

CLYDE R. BROWN,
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Monroe, Louisiana 71201.

Of Counsel:
SHOTWELL, BROWN & SPERRY,
708 Ouachita National Bank Building,
Monroe, Louisiana 71201.

CERTIFICATE OF SERVICE.

I, CLYDE R. BROWN, attorney of record for Respondent, do hereby certify that I have this day served a copy of the foregoing brief, on each of the attorneys of record of the petition as shown below, and also on the Solicitor General of the United States, by depositing same in the United States Post Office with sufficient air mail postage prepaid to those over 500 miles away and first class postage to those less than 500 miles distant.

AUG 19 1969

.....

CLYDE R. BROWN,
Counsel of Record.

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Department of Revenue
State of Louisiana
Post Office Box 201
Baton Rouge, Louisiana 70821

Solicitor General of the United States[1]
Department of Justice
Washington, D. C. 20530

[1] It is noted that the Collector served a copy of his petition to this Court on the Solicitor General of the United States. This may have been done for the reason that the Attorney General of the United States filed a brief in the Court of Appeals as *amicus curiae* in *Mississippi River*, which brief supported the position of the plaintiffs in that case, as against that of the Collector. Such brief is reproduced in the Appendix of the brief of the plaintiffs in *Mississippi River* which was filed in opposition to a petition to this Court for certiorari in *Mississippi River*. Such brief recites the reasons for filing of same as follows:

> "Louisiana has levied a severance tax upon the oil and gas lessee because of the extraction of oil and gas within Barksdale Air Force Base. The United States has no direct financial interest in these taxes. But the United States is vitally concerned with preservation of the federal jurisdiction over the base and with a proper application of the law relating to such jurisdiction. For that reason, it appeared as *amicus curiae* in Humble Pipe Line Co. v. Waggonner, 376 U.S. 369 (1964). For the same reasons, it has a direct interest in the instant case."

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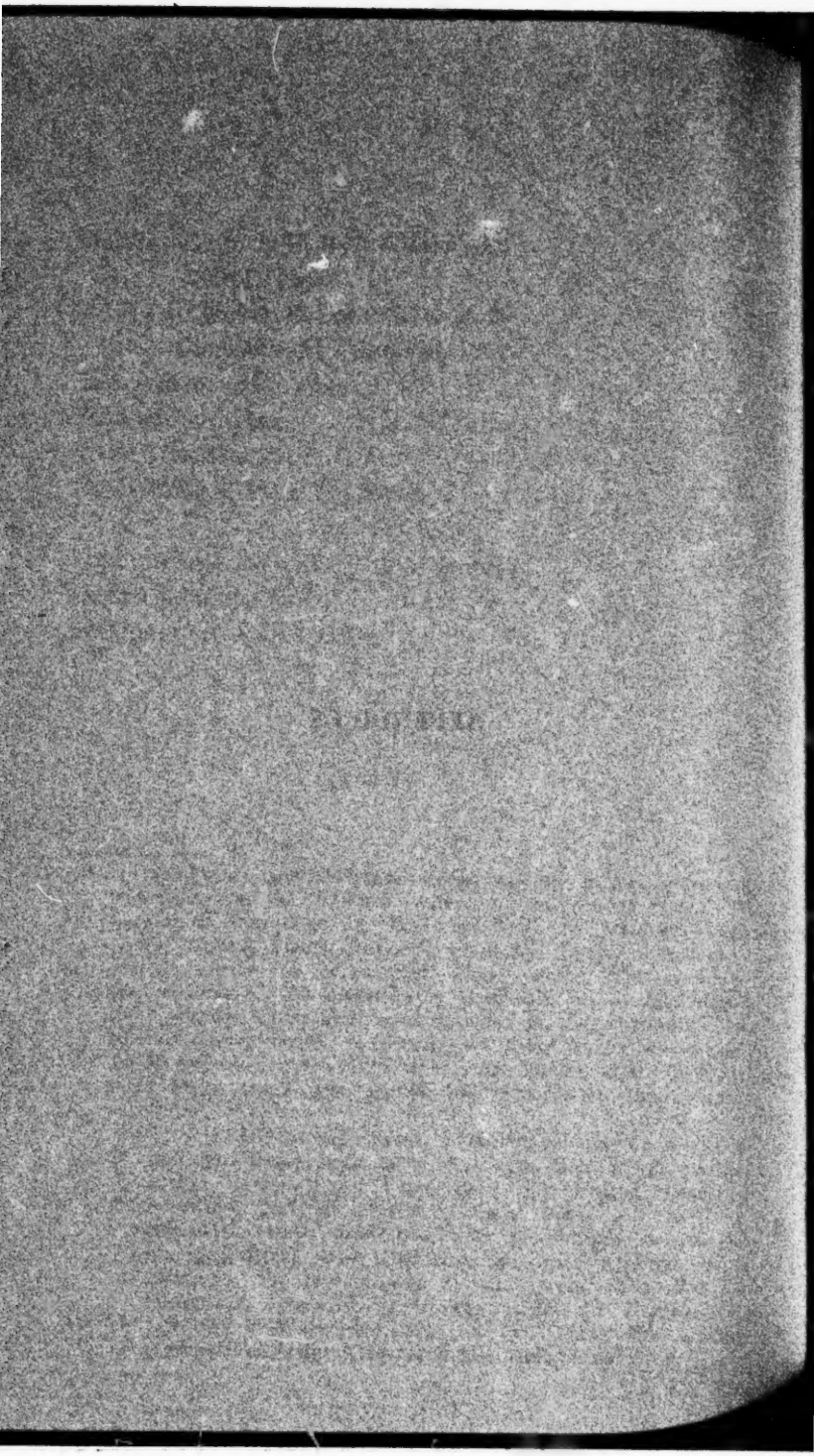
APPENDICES



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APPENDIX A.

STATE OF LOUISIANA, PARISH OF EAST BATON ROUGE, 19th DISTRICT COURT

No. 127,415

ASHTON J. MOUTON, COLLECTOR OF REVENUE, STATE OF LOUISIANA,

versus

SINCLAIR OIL & GAS COMPANY.

STIPULATION.

1.

During the year 1930 the United States of America acquired title to a tract of land constituting approximately 22,000 acres situated in the Parish of Bossier, Louisiana, for the establishment of a military air base, said lands being particularly described in the following conveyances, copies of which (with certain descriptions omitted) are annexed hereto as Exhibit D-A, D-B and D-C, respectively:

(A) Deed from the City of Shreveport, Louisiana to the United States of America, dated November 8, 1930, and recorded in Conveyance Book 102, page 472, of the records of Bossier Parish, Louisiana.

(B) Deed from the State of Louisiana to the United States of America, dated August 30, 1930, and re-

corded in Conveyance Book 102, page 469, of the records of Bossier Parish, Louisiana.

(C) Deed from the Board of Commissioners of the Bossier Levee District to the United States of America, dated February 5, 1930, and recorded in Conveyance Book 102, page 467, of the records of Bossier Parish, Louisiana.

2.

During the years 1930, 1931 and 1932 the United States caused extensive runways, administrative buildings, hospitals, barracks, machine shops, hangars and numerous other structures and facilities required for the maintenance of a military air force post or base to be constructed upon the above lands so acquired for that purpose, which properties and constructions thereon (as an entity) now known as "Barksdale Field" or "Barksdale Air Force Base", one of the major air bases in the United States, have been maintained by the government at all times since.

3.

That as of February 1, 1961 the United States executed in favor of Sinclair Oil & Gas Company an oil and gas lease covering and affecting the following described property, to-wit:

T. 18 N., R. 11 W., Louisiana Meridian
Sec. 31, W 1/2

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T. 18 N., R. 12 W., Louisiana Meridian
Sec. 33, E 1/2
Sec. 34, All
Sec. 35, All
Sec. 36, All;

a true copy of which lease is attached hereto as Exhibit D-D; that said property just above described constitutes a portion of the property acquired by virtue of the conveyances referred to in Article 1 hereof, the same forming an integral part of Barksdale Air Force Base, and being within the fence which encloses such base; that at the time such oil and gas lease was executed and at all times since, said land has, with other lands, been used for military purposes.

4.

The severance tax claimed herein is on distillate and gas produced by Sinclair Oil & Gas Company under its said lease from the United States from the lands described in such lease.

5.

That the State of Louisiana has made no effort to levy or collect severance taxes on the royalty interest of the United States in distillate and gas severed from Barksdale Air Force Base under the lease hereto annexed as Exhibit D-D.

6.

This stipulation shall be filed in these proceedings, and when filed, shall constitute a part of the record of said action.

DONE AND SIGNED on this 21 day of June, 1968.

(S.) EMMETT E. BATSON,
(Emmett E. Batson),
Attorney for Plaintiff.

(S.) CLYDE R. BROWN,
(Clyde R. Brown),
Attorney for Defendant.

Filed Jun. 27, 1968.
(S.) BOBETTE C. BURNS,
Dy. Clerk of Court.

APPENDIX B.

ORDER AND JUDGMENT.

(Number and Title Omitted)

(Filed: July 31, 1968)

This cause came on to be heard on motion of the Plaintiff to remand the same to the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, and on motion of Defendant for summary judgment and on cross-motion of the Plaintiff for summary judgment, and the Court having considered the record of the cause in the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, attached to Defendant's petition for removal, including the stipulation of the parties, and having heard the argument of counsel, and due deliberation having been had thereon, it is

(1) Ordered that this Court has jurisdiction of this cause, and, therefore, Plaintiff's motion to remand be, and it is hereby, denied;

(2) Ordered that Plaintiff's cross-motion for summary judgment be, and it is hereby, denied;

(3) Ordered, the Court finding that upon the pleadings and admissions on file that there is no genuine issue as to any fact herein, that, as a matter of law, Defendant is entitled to the relief prayed for in its motion

for a summary judgment for the reasons and conclusions set out by the Fifth Circuit Court of Appeals in Mississippi River Fuel Corporation v. Cocreham, 382 F. 2d 929 (5th Cir. 1967), writs refused 88 S. Ct. 1264 (1968), that, accordingly, Defendant's said motion for summary judgment be, and the same is hereby, granted, and that the Plaintiff have and recover nothing by his suit.

DATED July 31, 1968.

(S.) E. GORDON WEST,
United States District Judge.

APPENDIX C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26493

SHELL OIL COMPANY,
Plaintiff-Appellee,

versus

ASHTON J. MOUTON, Collector of Revenue, State of Louisiana,
Defendant-Appellant.

No. 26730

ASHTON J. MOUTON, Collector of Revenue, State of Louisiana,
Plaintiff-Appellant,

versus

SHELL OIL COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana

(April 22, 1969)

Before AINSWORTH and SIMPSON, Circuit Judges, and MITCHELL, District Judge.

PER CURIAM: These two appeals by the Louisiana Collector of Revenue were consolidated on his motion.

No. 26493. Suit was filed in this case in the United States District Court by Shell Oil Company against the Louisiana Collector of Revenue, under the provisions of LSA-R.S. 47:1576 (formerly Louisiana Act 330 of 1938) for recovery of Louisiana severance taxes paid under protest. The taxes were levied on the production of oil and gas under mineral leases granted to Shell by the United States on certain tracts of land situated in a federal military enclave, Barksdale Air Force Base in Bossier Parish, Louisiana. Shell's motion for summary judgment was granted and the Collector's motions to dismiss for lack of jurisdiction and, alternatively, to abstain were denied, on the basis of this Court's prior decision in *Mississippi River Fuel Corporation v. Cocreham*, 5 Cir., 1967, 382 F. 2d 929, rehearing denied, 1968, 390 F. 2d 34, cert. denied, 390 U. S. 1015, 88 S. Ct. 1264 (1968).

No. 26730. While Shell's motion for summary judgment in the preceding case, No. 26493, was pending, this declaratory suit was filed by the Louisiana Collector of Revenue against Shell Oil Company in a Louisiana state court for judgment declaring that LSA-R.S. 47:1576 did not waive Louisiana's sovereign immunity from suit in a federal court for the recovery of taxes paid under protest, that the Louisi-

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ana Constitution of 1921 and Article III, Section 35, and Article X, Section 18 thereof, did not authorize the Louisiana Legislature to waive sovereign immunity from suit in a federal court for taxes paid under protest, and that the acts of sale and donation of the Barksdale Air Force Base lands to the United States did not pass title to oil and gas in place so as to prevent Louisiana from taxing the production of oil and gas from such lands. Shell removed the case to the federal district court. The Collector's motion to remand, based on lack of jurisdiction in the federal court, was denied, and Shell's motion to dismiss the Collector's suit for failure to state a claim upon which relief could be granted was maintained, on the basis of *Mississippi River Fuel Corporation v. Cocreham*, supra.

In *Mississippi River Fuel Corporation v. Cocreham*, supra, the identical questions were presented which are now before us for review. In an able opinion by Judge Wisdom, this Court held that the State of Louisiana had no right to exact severance taxes on oil and gas produced under a mineral lease from the United States to Mississippi River Fuel Corporation on land forming part of the federal military enclave, Barksdale Air Force Base in Bossier Parish, Louisiana. We said in that case (at 931),

> "When the United States acquired title to the land, it acquired 'exclusive jurisdiction' over the property, precluding the State's levying and collecting a tax on oil and gas severed from the land by a third party under a lease from the United States. Article I, Section 8, Clause 17, United States Constitution; Humble Pipe Line Co. v. Waggonner, 1964, 376 U. S. 369, 84 S. Ct. 857, 11 L. Ed. 2d 782."

In *Mississippi River Fuel Corporation* suit was filed in the United States District Court under LSA-R.S. 47:1576 for recovery of Louisiana severance taxes paid under protest. The Louisiana statute authorizes such suit in a federal or state court. We considered the Collector's contentions that the Louisiana Constitution of 1921 prohibited such suits except in a Louisiana state court and held that under the provisions of Article X, Section 18, of the Louisiana Constitution, the Louisiana statute complied with Louisiana constitutional provisions, and that Article III, Section 35, of the Louisiana Constitution was inapplicable to taxpayer's suits for refund of taxes paid. We also held (390 F. 2d at 35, 36) that there was no merit to the Collector's contention that since the United States did not acquire title to the oil and gas in place underlying Barksdale Air Force Base, the State could not be prevented from levying severance taxes on the production of oil and gas therefrom.

In our opinion in *Mississippi River Fuel Corporation* clearly and concisely disposed of all of the contentions raised by the Collector in the present cases. We said (390 F.2d at 36),

> "The argument that in its sovereign capacity Louisiana has the power to impose a tax on the severance of oil and gas in a federal enclave collides with the Supremacy Clause."

We found, therefore, that the State of Louisiana did not have the right to levy severance taxes on the production of oil and gas from the federal military enclave, Barksdale Air Force Base. Now the Collector seeks in effect to

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relitigate this question of law which we have already settled on the identical question of law, involving the identical federal military establishment.

There is no difference between these cases and the *Mississippi River Fuel* case. Every question now raised was fully litigated and resolved in that case against the Collector.

Nor should we abstain while the Collector seeks a declaration from Louisiana state courts on the question of federal jurisdiction. The propriety of levying taxes on a federal military installation where exclusive jurisdiction resides in the Federal Government under the plain provisions of Article I, Section 8, Clause 17, of the United States Constitution, presents a substantial federal question for decision. The federal courts must determine issues of law pertaining to federal jurisdiction. The fact that questions of state law must be decided does not change the character of the right which remains federal. *J. I. Case Company v. Borak*, 377 U.S. 426, 434, 84 S. Ct. 1555, 1561 (1964). Our decision in *Mississippi River Fuel* solved that issue by its holding that the federal court was a proper forum in circumstances identical with those here. See *Mater v. Holley*, 5 Cir., 1952, 200 F. 2d 123. See also *Willis v. Flournoy*, 236 La. 983, 109 So.2d 490 (1959).

AFFIRMED.

APPENDIX D.

LSA—TITLE 47.

§ 1574. Collection by summary court proceeding authorized

In addition to any other procedure provided in this subtitle or elsewhere in the laws of this state; and for the purpose of facilitating and expediting the determination and trial of all claims for taxes, penalties, interest, attorney fees, or other costs and charges arising under this Sub-title, there is hereby provided a summary proceeding for the hearing and determination of all claims by or on behalf of the state, or by or on behalf of the collector, for taxes, excises, and licenses and for the penalties, interest, attorney fees, costs or other charges due thereon, by preference in all courts, all as follows:

(1) All such proceedings, whether original or by intervention or third opposition, or otherwise, brought by or on behalf of the state, or by or on behalf of the collector, for the determination or collection of any tax, excise, license, interest, penalty, attorney fees, costs or other charge, claimed to be due under any provision of this Subtitle, shall be summary and shall always be tried or heard by preference, in all courts, original and appellate, whether in or out of term time, and either in open court or chambers, at such time as may be fixed by the court, which shall be not less than two nor more than ten days after notice to the defendant or opposing party.

(2) All defenses, whether by exception or to the merits, made or intended to be made to any such claim, must be presented at one time and filed in the court of original juris-

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diction prior to the time fixed for the hearing, and no court shall consider any defense unless so presented and filed. This provision shall be construed to deny to any court the right to extend the time for pleading defenses; and no continuance shall be granted by any court to any defendant except for legal grounds set forth in the Louisiana Code of Practice.

(3) That all matters involving any such claim shall be decided within forty-eight hours after submission, whether in term time or in vacation, and whether in the court of first instance or in an appellate court; and all judgments sustaining any such claim shall be rendered and signed the same day, and shall become final and executory on the fifth calendar day after rendition. No new trial, rehearing or devolutive appeal shall be allowed. Suspensive appeals may be granted, but must be perfected within five calendar days from the rendition of the judgment by giving of bond, with good and solvent security, in a sum double that of the total amount of the judgment, including costs. Such appeals, whether to a court of appeals or to the Supreme Court, shall be made returnable in not more than fifteen calendar days from the rendition of the judgment.

(4) Whenever the pleadings filed on behalf of the state, or on behalf of the collector, shall be accompanied by an affidavit of the collector or of one of his assistants or representatives or of the counsel or attorney filing the same, that the facts as alleged are true to the best of the affiant's knowledge or belief, all of the facts alleged in said pleadings shall be accepted as prima facie true and as constituting a prima facie case, and the burden of proof to establish anything to the contrary shall rest wholly on the defendant or opposing party.

APPENDIX E.

ACT 12 of 1892.

Section 1. Be it enacted by the General Assembly of the State of Louisiana, That the United States shall have power to purchase or condemn in the manner prescribed by law, upon making just compensation therefor, any land in the State of Louisiana, not already in use for public purposes, required for custom houses, court houses, arsenals, national cemeteries, or for other purposes of the government of the United States.

Sec. 2. Be it further enacted, etc., That the United States may enter upon and occupy land which may have been, or may be purchased or condemned, or otherwise acquired, and shall have the right of exclusive jurisdiction over the property so acquired during the time that the United States shall be or remain the owner thereof for all purposes, except the administration of the criminal laws of said State, and the service of civil process of said State therein, and shall hold the same exempt from all State, parochial, municipal or other taxation.

ACT No. 31 of 1942.

Section 1. Be it enacted by the Legislature of Louisiana, That Sections 1 and 2 of Act No. 12 of 1892 be amended and re-enacted so as to read as follows:

Section 1. Be it enacted by the Legislature of Louisiana, That the consent of the State of Louisiana is here-

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by given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this State required for sites for forts, magazines, arsenals, dockyards, and other needful buildings, or for any other purposes of the Government of the United States.

Section 2. That the United States may enter upon and occupy any land in the State of Louisiana which it has heretofore acquired, or may hereafter acquire, by purchase, condemnation, lease or otherwise, required for sites for forts, magazines, arsenals, dockyards, and other needful buildings, or for any other purposes of the Government of the United States, and shall have the right of exclusive jurisdiction over the property so acquired, during the time that the United States shall be or remain the owner or lessee thereof, for all purposes, except that the State retains the right to serve therein all civil and criminal process issuing under authority of the said State, and all lands so held and title to which is vested in the United States shall be and remain exempt from all state, parochial, municipal or other taxation, assessment or other charges which may be levied or imposed by or under authority of this State.

(Act 12 of 1892 and Act 31 of 1942 were codified in 1950 as LSA-R.S. 52:1.)